Supreme Court of the United States.

October Term, 1978.

No. 78-67

TRUSTEES OF BOSTON UNIVERSITY,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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The Trustees of Boston University pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on April 13, 1978.

Opinions Below.

The opinion of the Court of Appeals is reported at — F. 2d —, 98 LRRM 2070 (1978) and is reproduced in Appendix A, *infra*, pp. 35-55. The decision and order of the National Labor Relations Board is reported at 228 NLRB No. 120 and is reproduced in Appendix B, *infra*, pp. 57-75. The Board's decision and direction of election in the underlying representation proceeding is unreported and is reproduced in Appendix C, *infra*, pp. 77-118.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 13, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether the exclusion of the Law, Medical and Dental faculty from an otherwise comprehensive unit of full-time University faculty was proper where all faculty share a substantial community of interest and where the Board failed to consider that the excluded faculty had fully participated in the University's governance system and where they would be deprived of a continued voice in University affairs due to the fact that the governance system would be effectively replaced by the bargaining agent.

2. Whether the fact that the University's department chairmen exercise their supervisory authority in a collegial context deprives them of their status as supervisors or managerial employees under the National Labor Relations Act.

3. Whether the National Labor Relations Board's rule that chairmen who admittedly exercise supervisory authority over non-unit employees do not qualify as supervisors solely because they spend less than 50% of their time in such duties violates §§ 14(a) and 2(11) of the National Labor Relations Act.

Statute Involved.

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, *et seq.*, 61 Stat. 136, 73 Stat. 519 ("the Act"), are reproduced in Appendix D, *infra*, pp. 119-120.

Statement of the Case.

A. The Board Proceedings.

1. *The Representation Case.* On October 18, 1974, the Boston University Chapter of the American Association of University Professors ("AAUP" or "the Union") filed a petition for certification requesting a unit of all full-time faculty including department chairmen, excluding the faculty of the Schools of Law, Medicine and Dentistry. The University contended that the unit petitioned for was inappropriate because it excluded faculty of the Law, Medical and Dental Schools and also excluded all part-time faculty.[1] The University further argued that department chairmen were supervisors or managerial employees within the meaning of the Act and therefore must be excluded.

The representation hearing conducted by the Board's Regional Director to determine the appropriate unit disclosed the following facts material to this petition:

Boston University is composed of 16 Schools and Colleges, 14 of which are located on the Charles River Campus (Tr. 3435; Er. Exh. 2).[2] The Schools of Medicine and Graduate Dentistry are located at the Boston University Medical Center, approximately a mile and a quarter from the Charles River Campus (Tr. 40-61). Of the 16 Schools, the School of Theology, School of Law, School of Medicine, School of Graduate Dentistry, School of Social Work, and the Graduate School confer only graduate degrees. The Colleges of Basic Studies and Liberal Arts are two and four year undergraduate programs, respectively. The remain-

[1] The University sought to include part-time faculty with either three-quarter status or University voting rights.

[2] "Tr." references are to pages of the transcript of the representation hearing before a Hearing Officer of the National Labor Relations Board. "Er. Exh." references, in turn, are to Employer Exhibits introduced at the hearing.

ing Schools — the School of Education, School of Management, College of Engineering, School for the Arts, School of Public Communication, Metropolitan College, School of Nursing, and Sargent College of Allied Health Professions — offer both graduate and undergraduate programs (Tr. 38-39).

Student enrollment at the University is approximately 24,500 and there are approximately 2,200 instructional personnel (Tr. 125). Faculty members often hold appointments to and teach in more than one School (Tr. 126), and various faculty are appointed to both Schools included in the bargaining unit as well as to one of the excluded Schools.

The faculty of the University share common employment conditions, including a tuition remission program, life and health insurance, travel and accident insurance, personal and family accident insurance, disability insurance, retirement and sick leave benefits (Tr. 1893; Er. Exh. 23). The faculty, moreover, are compensated monthly (Tr. 127), have uniform position titles and are subject to similar hiring, promotion and tenure procedures.

The faculty of all Schools participate in the University's governance structure. Voting members of all Schools, including Law, Medicine and Dentistry, constitute the Faculty Senate and are eligible for election to the Senate Council. The Council, as a body and especially through its committees, considers and makes recommendations on virtually every topic affecting the University (Tr. 91-93). The Committees range in scope from Appointments, Promotions, Tenure and Salaries, to Budget, to Academic Policies and Procedures, to Grievance. In addition, the Senate Council is represented on search committees for various positions, including those charged to recommend candidates for deanships.

The Law School

Boston University's Law School is located in the center of the Charles River Campus, sharing with the School of Education a building designated the Law-Education Tower (Tr. 1862; Er. Exh. 1). The Dean of the Law School reports to Academic Vice-President Doner who also has jurisdiction of the College of Liberal Arts, the Graduate School, School of Education, Public Communication, Engineering, Metropolitan College and Basic Studies, the faculty of which are all included in the collective bargaining unit (Er. Exh. 8). The Dean of the Law School is a member of the University Council, composed of the President, Vice Presidents and Deans of every School, which meets monthly to advise the President on academic matters (Tr. 1797-1798).

University-wide budgetary procedures and policies concerning expenditure requests, travel funds and payment of extra compensation for overload or summer term teaching apply to the Law School (Tr. 1868, 1872; Er. Exh. 132). Moreover, hiring, evaluation, promotion and tenure procedures, eligibility for fringe benefits and personnel rules generally, including salary procedures and retirement policy, are uniform throughout the University system, including the Law School (Tr. 1893, 1799-1804, 1878; Er. Exh. 23).

There exists a significant amount of instructional integration between the Law School and other Schools of the University. Not only do several law students take courses in Schools other than the Law School, but 119 non-law students were enrolled in law courses. In addition, the Law School and the College of Liberal Arts jointly administer a six year law degree program, and the University sponsors a Center for Law and Health Sciences which draws its faculty from the Schools of Law, Medicine, Nursing and Sargent College of Allied Health Professions (Tr. 68).

Faculty of the Law School participate significantly in University governance and in the activities of University committees. For example, the Law School has representatives on thirteen University committees including the Appointments, Promotion, Tenure and Salaries Committee, the Academic Advisory Committee and the Calendar Committee (Er. Exh. 127; Tr. 1804-1821) and has been regularly and routinely represented on search committees for a variety of positions in other University Colleges or their departments (Tr. 1804-1821).

The Medical and Dental Schools.

The Boston University Medical Center, containing the Schools of Medicine and Graduate Dentistry, is located in Boston approximately one mile and a quarter from the Charles River Campus (Tr. 45). The Deans of Medicine and Dentistry report to Dr. Richard Egdahl, Academic Vice-President for Health Affairs, who also has jurisdiction over the Schools of Nursing, Social Work and Sargent College of Allied Health Professions, the faculty of which were included by the Board in the unit. The Deans of Medicine and Dentistry, like their counterparts in each of the University's other Schools, are part of the University Council (Tr. 1699-1701).

University personnel practices, including appointment and nonreappointment procedures, salary adjustment, retirement policies, eligibility for fringe benefits, evaluations, promotions and sabbatical policies, apply with equal force to the Medical and Dental Schools (Tr. 1681-1682, 1687-1688, 1697-1699, 1893; Er. Exhs. 23, 113, 120, 139).

As is the case with the Law faculty, the Medical and Dental faculty participate fully in a variety of instructional programs with their colleagues from Schools whose faculty members were included in the unit (Tr. 1742, 95-96). Members of the Medical faculty teach at the Charles River Campus, including the Center of Law and Health Sciences. A six year liberal arts and medical education program is offered jointly by the School of Medicine and the College of Liberal Arts, and a two year program is jointly sponsored by the Dental School and Metropolitan College (Tr. 94, 117-118; Er. Exh. 20). In addition, faculty in the Health Education program have joint appointments to the Medical School, while Sargent College offers a combined program in nutrition in which faculty from Sargent, the Schools of Nursing, Medicine, Education and Dentistry participate. Moreover, members of the Medical and Dental faculty participate significantly in graduate programs in chemistry and biology, as well as in the Division of Medical and Dental Sciences of the Graduate School of which 80 to 85 Medical and Dental faculty are members (Tr. 97-98, 174-175).

Furthermore, like their colleagues in the Law School, Medical and Dental faculty participate significantly in University governance and in the activities of University committees (Tr. 92-93, 1703; Er. Exhs. 122, 127).

Department Chairmen at Boston University.

Initially, department chairmen are appointed by the dean of their School or College. Appointments are typically for renewable three year terms, and some chairmen have served for over a decade. Appointments are based upon several factors, including professional reputation, expertise, and ability to recruit new faculty and "manage a professional staff within departments" (Tr. 583). Moreover, chairmen are sometimes recruited from outside the University (Er. Exh. 89 A, B). While the faculty may serve on search committees or otherwise participate in the appointment procedure, the appointment recommendation is by the dean and does not necessarily reflect a consensus of the departmental faculty.

None of the chairmanships is either rotating or elective, and final authority for the appointment rests with the President and Trustees.

Chairmen are responsible for identifying and justifying the necessity of additional faculty, typically in consultation with the dean. Thereafter, chairmen recruit, screen and recommend candidates. The degree of participation of the faculty in the recruitment and screening process can vary directly with the rank and anticipated salary of the vacancy, but whatever the search procedures utilized, the appointment recommendation is the sole responsibility of the department chairman. The chairman also recommends an initial salary for the appointee (Tr. 1105-1106). The chairmen's recommendations are variously accorded "strong weight" (*e.g.*, School of Public Communication — Tr. 338), are "invariably followed" (*e.g.*, School of Management — Tr. 589), are "almost one hundred percent effective" (*e.g.*, School of Medicine — Tr. 1481), or are followed "in all cases" (*e.g.*, School of Engineering — Tr. 437).

The hiring of part-time faculty is far less formal than that of their full-time counterparts and the department chairman is often the only member of the department or the administration to interview the candidate (Tr. 589-590, 2605). Typically, the department chairmen recommend the hiring of part-time faculty without any prior consultation with department faculty, and the recommendation is undisputably effective (Tr. 438, 340, 948).

Chairmen are also empowered to recommend effectively salary increases, reappointment, promotion and tenure. Salary recommendations are typically accomplished without consultation with the faculty (Tr. 2805-2808, 1296-1300, 2603-2604, 2813, 2868). As to reappointment or nonreappointment of untenured faculty, the record establishes that chairmen are solely responsible for developing and submitting recommendations. Although chairmen may review

with senior faculty members the performance of junior colleagues, the final recommendation is the chairman's alone (Tr. 657-658). The chairmen also play a critical role in the promotion and tenure procedures (Tr. 1129, 1131). In addition, chairmen have the power to reprimand faculty members, adjudicate their disputes, and discuss with them student complaints (Tr. 2822-2823, 3065, 1300).

In the chairmen's role as principal administrators of their departments, the chairmen typically attend regularly scheduled meetings with the deans of their schools — at which none of the faculty is present — to consider a variety of policy questions, including budgetary matters, criteria for the recommendation of salary increments, curriculum development and personnel procedures and practices (Tr. 335-336, 430-431, 533, 1102-1103, 1282, 1426, 1475). Additionally, deans and associate deans often confer individually with department chairmen to review diverse issues.

Chairmen play a significant role in the preparation of their departmental budgets and, once established, the budget is managed solely by the department chairmen who retain substantial flexibility within budgetary lines; recommend to the deans modification thereof; and allocate funds for speeches, symposia, supplies, and travel expenses for faculty members (Tr. 969-970, 1133-1134, 2925-2926). The administrative responsibilities of chairmen include the assignment of faculty to courses, scheduling courses, reconciling conflicts and assigning student advisers. In conjunction with their control over scheduling, department chairmen are also responsible for arranging coverage of classes in the event that the regularly-assigned faculty member cannot attend because of illness, personal business or participation in professional conferences. Indeed, faculty requests to attend or to participate in professional meetings are subject to the approval of the chair-

man. Requests for extended leave or sabbaticals, in turn, are similarly submitted to the chairman who then forwards a recommendation to the dean (Tr. 1127-1128, 2873-2874).

Finally, in recognition of their non-instructional duties, chairmen enjoy a significantly reduced teaching load and their level of compensation reflects their status (*e.g.*, Tr. 324, 1270-1271, 1075; Ex. Exhs. 95, 96). In connection therewith, department chairmen enjoy several incidental benefits, including their own secretaries, larger and better-equipped offices, and more importantly, control of support personnel[3] over whom they exercise virtually the full range of supervisory authority (Tr. 1095-1097, 1099-1100; Er. Exh. 91).

The Representation Decision.

The Board, adopting *pro forma* the findings of the Regional Director, concluded that the "law school faculty constitutes an identifiable group of employees whose separate community of interest is not irrevocably submerged in the broader community of interest that they share with other faculty members . . ." and that a collective bargaining unit excluding Law School faculty would be appropriate (Appendix C, *infra,* p. 110). Likewise, the Board adopted the Regional Director's findings that the faculty of the Medical and Graduate Dental Schools did not share a community of interest with the rest of the faculty "so interwoven" as to render their exclusion inappropriate (Appendix C, *infra,* p. 115).

The Board similarly adopted the Regional Director's conclusion that department chairmen are not supervisors largely because the record allegedly disclosed:

[3] The chairman's support complement may range in number from a single secretary to several clericals, technicians and administrative assistants (Tr. 1498-1499). Regardless of the number, support personnel are subject to reprimand or termination by the chairman, who also retains the authority, *inter alia,* to assign work or recommend salary adjustments.

> ". . . collective rather than authoritarian action, most of which is not only reviewable on the higher administrative levels, but which in significant numbers of cases has been shown to be ineffective . . ." (Appendix C, *infra,* pp. 94-95).

The Board went on to find that although department chairmen did exercise the requisite supervisory authority with respect to non-unit and support personnel, this did not make them supervisors for they spent less than 50% of their time engaged in such supervision. The chairmen were not found to be managerial employees based on the Board's finding that their interests are more akin to faculty than to the administration (Appendix C, *infra,* p. 95). In support of its conclusion, the Board cited a single case — *Fordham University II,* 214 NLRB 971 (1974).

From among a total faculty of approximately 2,200, an election was directed among full-time faculty excluding Law, Medicine and Dentistry, and including department chairmen. Two Board members dissented (Appendix C, *infra,* p. 118). The Union won the election by a margin of 394 to 262, and, on August 13, 1975, was certified by the Board as the exclusive bargaining agent.

2. *The Unfair Labor Practice Case.* On or about August 27, 1975, the Union requested that the University engage in collective bargaining — a request which the University denied because it believed that the certification was invalid. The Union thereupon filed unfair labor practice charges with the Board, and the General Counsel moved for summary judgment against the University. On March 27, 1977, the Board issued its Decision and Order, concluding that the issues sought to be litigated by the University were or could have been litigated in the prior representation proceeding (Appendix B, *infra,* pp. 62-63). Finding that no litigable issue was presented, the Board granted summary judgment against the University and or-

dered the University to cease and desist from its unfair labor practices, to bargain with the Union upon request, and to post appropriate notices.

B. The Court of Appeals Decision.

The Court of Appeals enforced the Board's order. The Court found that the Board had not abused its discretion in excluding the faculty of the Law, Medical and Graduate Dental Schools from the bargaining unit. Allowing the Board "a large measure of informed discretion," the Court also ruled that the Board was entitled to find that chairmen were acting in the interests of the faculty and not of the employer and that the authority exercised by the chairmen was the result of consultation with the faculty. The Court further found that the department chairmen's authority over non-unit and support personnel did not cause them to be either supervisors or managerial employees.

Reasons for Granting the Writ.

The Case Presents Important Issues Never Addressed by This Court Involving the Application of the National Labor Relations Act to Alter the Role of the Faculty in the Basic Governance Structure of Private Universities.

1. *The Decision of the National Labor Relations Board, Which Was Given Force and Effect by the Circuit Court, Arbitrarily Excluded the Faculty of Boston University's Schools of Law, Medicine and Graduate Dentistry From a University-wide Collective Bargaining Unit. In Making Its Determination, the Board Failed to Consider the Unique Characteristics of University Faculty Which Require a Comprehensive Unit.*

The determination of the Board, deferred to by the Court, which excludes the faculty of the Law, Medical and

Graduate Dental Schools from an otherwise comprehensive unit of full-time University faculty has two principal faults: first, applying the standards for unit determinations developed by the Board in its experience with the industrial sector, it is an arbitrary and irrational grouping which is unsupported by the record and conflicts with well-established Board policies; second, the Board has failed to consider in its determination the unique characteristics of a university faculty which independently require a single unit of all full-time faculty.

On the basis of the facts briefly outlined in the *Statement, supra,* pp. 3-7, we submit that the uniformity of employment conditions, interchange of faculty, instructional integration, centralization of administration, and participation of the excluded faculty in a university-wide system of governance rationally foreclose carving out from an otherwise comprehensive unit the Schools of Law, Medicine and Graduate Dentistry.

The "professional" faculty at these three Schools share with their colleagues elsewhere at the University a far greater similarity than dissimilarity of employment conditions and concerns. The attributes of the law and medical faculty which the Board cites as distinguishing them from the rest of the faculty — including greater compensation; "expedited" tenure consideration (Law School); accreditation and heavier endowment of their schools; variant academic calendars; lower faculty-student ratio (especially Medical and Dental); private practices of faculty members; sources of funding (Medical School); or geographical separation from the Charles River Campus (Medical and Dental Schools) — are in large measure not unique to the excluded faculty and in any case are inadequate to support their exclusion, particularly where no labor organization seeks to represent them separately. For

example, accreditation requirements do not apply only to Law, Medicine and Dentistry; indeed, Education, Social Work, Nursing, Engineering and Sargent College have similar accreditation or licensing requirements. The percentage of tenured faculty at the Law School, which utilizes University tenure eligibility rules, is exceeded by the Schools of Theology and Engineering, which are included in the unit. The percentage of faculty members at the Law School who engage in private consultation is estimated at 50%, which is lower than the percentage at the Schools of Public Communication (60-70%), Management (90%), Education (60-70%) or the College of Engineering (60-70%), and not much above the School of Theology (30-40%). The Law School and University calendars, in turn, are not significantly different; thus, the Law School and University fall semesters similarly commenced on September 3 and ended only a week apart, as did the start of the spring semesters. Furthermore, the Medical School is by no means alone in its use of "restricted funds" (58.9% of total expenses); the Graduate Centers and School of Nursing have a comparable percentage of restricted funds (61.5% and 56.9%, respectively), while the School of Social Work is not far behind (48.4%). The Dental School, in contrast, operates with only 8.9% restricted funding. Finally, the distance between the Medical and Dental Schools and the Charles River Campus (1¼ miles) is no greater than the distance between some of the buildings *on* the Charles River Campus from each other. Thus the differences between the included and excluded schools vanish upon closer scrutiny.

More importantly, the faculty at the three excluded Schools share with their "unit" colleagues a fundamental community of interest which is based upon their mutual commitment to teaching and is unobscured by variations in

collateral employment conditions. Indeed, the faculty *included* in the unit reflect a disparity of interests — attributable to rank, compensation, tenure, *et al.* and a devotion to separate academic disciplines — that at least equals, if not exceeds, the putative disparities that dictated the exclusion of the three Schools. If unit determinations in the academic community turn upon the considerations invoked by the Board to exclude the Law, Medical and Dental faculty, then "professional" faculty in Engineering, Nursing or Social Work — to cite a few examples — may with equal justification be excluded from the bargaining unit.

Even the Circuit Court felt compelled to question the Board's decision—

> "The principal fault which can be found with its determination is that some of the reasons given for separating the Law School from the other Charles River campus schools would be equally applicable to the University's other professional schools, e.g., the Schools of Engineering, Public Communications, Management, and, perhaps, even the Schools of Fine Arts, Nursing, and Sargent College of Allied Health . . . However, we do not review the Board's decision *de novo*, but must determine only if it has abused its discretion [citations omitted]" (Appendix A, *infra*, pp. 45-46).

The Petitioner submits that the track record of the Board in the field of higher education since it assumed jurisdiction in 1970 merits anything but deference by the courts.[4]

Not only is the Board's exclusion of the Law, Medical and Dental faculty irrational when viewed in light of its inclusion of the other professional Schools at the Univer-

[4] See discussion *infra*, pp. 20-22.

sity, but this determination contravenes the Board's expressed policies governing appropriate units. It is well settled that establishment of bargaining units composed of the largest groups of employees with a requisite community of interest not only maximizes the collective bargaining effectiveness of employees in negotiating conditions of employment with their employer but also more effectively achieves the legislative purpose of promoting "industrial" stability by avoiding unit fragmentation and its potential ill effects of conflicting or competitive claims by several rival units which must work together but which may choose to be represented by different and perhaps antagonistic unions. *See, e.g., Pittsburgh Plate Glass Company v. NLRB,* 313 U.S. 146, 152 (1941). Indeed the Board itself has consistently recognized in the industrial sector that employees may not appropriately be represented for purposes of collective bargaining separately or apart from other employees with whom they enjoy a close community of interest based on common personnel practices, conditions of employment, and supervision—particularly where the entire operation of the employer is integrated.[5] Obviously, the greater the number of units eventually created, the more time and resources the University will be required to divert from its primary educational mission to the already complicated, largely uncharted sphere of collective bargaining in academia. Moreover, the uniformity of many employment conditions, including virtually all fringe benefits, underscores the difficulty and inadvisability of a multi-unit bargaining structure. Furthermore, the existence of several units will inevitably create a "whipsawing" of the University in which

[5] See, *e.g., Kalamazoo Paper Box Corp.,* 136 NLRB 134, 139 (1962); *L & S Construction Company, Inc.,* 155 NLRB 524, 527 (1965).

rival organizations will compete for a share of limited University dollars.[6]

The Board has not only disregarded its own policy regarding unit determinations, but has also chosen to ignore its most applicable precedent, *Fairleigh Dickinson University,* 205 NLRB 673 (1973), in which the dental faculty were included in a broad unit given that no union sought to represent them separately, and where several indicia—*e.g.,* participation in university governance, access to a system-wide grievance procedure, applicability of university policies concerning retirement, sabbatical, promotion, etc., and limited curriculum integration supported their inclusion.[7]

But the harm which will befall Boston University and other similarly situated universities from arbitrary determinations which carve out part of a faculty from an otherwise comprehensive unit goes far beyond the difficulties due to fragmentation which have been experienced in the industrial sector. For while the Board has occasionally paid lip-service to the unique circumstances which distinguish the worlds of academia and industry,[8] it has failed to take such differences into account in its unit determinations.

Of the many differences between the faculty at a university and the workers in industry, perhaps the most significant is the participation of the faculty in the gov-

[6] See *Claremont Colleges,* 198 NLRB 811, 819 (1974) (Member Kennedy, dissenting).

[7] Petitioner urges that the Board's failure to reconcile its inconsistent decisions, if not a basis for invalidation of its action, at least dictates a remand for further rationalization and articulation of policy. *NLRB v. Metropolitan Life Ins. Co.,* 380 U.S. 438 (1965).

[8] See, *e.g., Syracuse University,* 204 NLRB 641 (1973).

ernance of the university.[9] The importance of this system of shared authority in the American university cannot be underestimated. And yet neither the Board nor the Circuit Court considered the significance of this system in the determination to sever the Schools of Law, Medicine and Dentistry from the rest of the faculty. The equal and full participation of the excluded faculty in this University-wide system demonstrates a single community of interest which requires a single bargaining unit. This fact was ignored by the Board.[10] Nor did the Board consider the impact on the excluded faculty when this traditional mode of institutional governance has been dismantled. The certified faculty bargaining agent will effectively replace the University's existing governance structure;[11] yet while the existing system represented the in-

[9] See generally Kahn, *The N.L.R.B. and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. Law Rev. 63, 66 *et seq.* (1973).

[10] In one of the many anomalies present in its decision, the Board relies on the "minimal" participation of part-time faculty in University governance as a factor dictating their exclusion from the faculty unit (Appendix C, *infra*, pp. 102-103). Yet the Board fails to consider as a factor militating in favor of inclusion of all full-time faculty the participation of all such faculty in the University's shared authority system.

[11] Section 9(a) of the Act provides, *inter alia*, that a collective bargaining representative shall be the "exclusive" bargaining representative of unit employees with respect to all conditions of employment. Since the employer's obligation to bargain with the selected representative is "exclusive," it carries with it "the negative duty to treat with no other." *Medo Photo Supply Corporation v. NLRB*, 321 U.S. 678, 684 (1944). While the Board has specifically declined to give an "advisory" opinion on the applicability of the exclusivity principle to university governance systems, Member Kennedy was less reserved:

> "In my judgment this Board is statutorily required to apply the exclusive representation principle to those colleges and universities over which it asserts jurisdiction. Undoubtedly,

terests of all the faculty, the bargaining agent does not. The excluded faculty are disenfranchised—a fact which will have the dual effect not only of silencing their voice in University affairs but also of diminishing the voice of the certified bargaining agent which, while claiming to represent the "faculty," actually speaks only for a part.

In addition, given that the vast majority of the University's Schools are included in the unit, and given the present University-wide uniformity of employment conditions, it is likely that changes in those conditions resulting from the bargaining process will apply to *all* faculty. While not speaking for all of the faculty, the Union's voice may well be the only one heard. Such a result is hardly consistent with the democratic principles underlying the National Labor Relations Act.

The University submits that the Board has ignored its own admonition stated in *Kalamazoo Paper Box Corporation*, 136 NLRB 134, 137 (1962):

> "Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered."

The accommodation of collective bargaining and the existing structure of private universities is difficult enough

this will affect the ability of faculty members to utilize existing governance structures in dealing with the administration . . ." *Northeastern University*, 218 NLRB 247, 256 (1975).

without the Board's further complicating the process by fashioning bargaining units which ignore the fundamental characteristics of the university. If the Board's determination is not reversed, Boston University will not only lose its existing form of government, it will also be forced into a bargaining relationship which is structurally unsound and which can only lead to chaos. Without guidance by this Court, the Board will continue to require universities to conform to its industrial model of university life, a model which will, in essence, become a self-fulfilling prophecy.

2. *The Board Erroneously Found that Because the Authority of Department Chairmen Is Exercised in the Collegial Context, Typical of Academic Institutions, the Chairmen Do Not Constitute Supervisors or Managerial Employees under the Act. This Determination Serves to Deprive the University of a Critical Group Necessary to the Formation and Implementation of University Policy.*

In its decision, the Circuit Court stated that it deferred to the "expertise of the Board" and allowed it a large amount of "informed discretion" (Appendix A, *infra*, p. 43) in reviewing the Board's determination that department chairmen at Boston University were not supervisors under the Act.

The Petitioner submits that any deference to the Board's "expertise" in representation cases in the field of higher education is unwarranted. Since first asserting jurisdiction over nonprofit, educational institutions in 1970,[12] the Board has frequently considered whether department chairmen individually exercise sufficient authority to require

[12] *Cornell University*, 183 NLRB 329 (1970).

their exclusion as supervisors.[13] Even a cursory analysis of the Board's treatment of the supervisory status of department chairmen reveals the lack of any consistent thread or even intelligible guidelines. Indeed, one can only speculate why department chairmen possessing essentially similar authority are excluded from a faculty unit in one case and included in another.[14] The Board's decision in this case is not only unsupported by the record but is yet another example of the Board's disregard of its obligation to reconcile apparently inconsistent decisions. The only authority cited by the Board in support of the instant decision is a single cryptic reference to *Fordham University II*, *supra* (Appendix C, *infra*,

[13] Department chairmen have been excluded as "supervisors" in *C. W. Post Center of Long Island University*, 189 NLRB 904 (1971); *Long Island University (Brooklyn Center)*, 189 NLRB 909 (1971); *Adelphi University*, 195 NLRB 639 (1972); *Fairleigh Dickinson University, supra; Syracuse University*, 204 NLRB 641 (1973); *Point Park College*, 209 NLRB 1064 (1974); *Rensselaer Polytechnic Institute*, 218 NLRB 1435 (1975); *New York University (II)*, 221 NLRB 1148 (1975); and *University of Vermont and State Agricultural College*, 223 NLRB 423 (1976). Conversely, chairmen have been included in faculty units in *Fordham University (I and II), supra; University of Detroit*, 193 NLRB 566 (1971); *Florida Southern College*, 196 NLRB 888 (1972); *Rosary Hill College*, 202 NLRB 1137 (1973); *Tusculum College*, 199 NLRB 28 (1972); *New York University (I)*, 205 NLRB 4 (1973); *Northeastern University*, 218 NLRB 247 (1975); *Yeshiva University*, 221 NLRB 1053 (1975); and *Fairleigh Dickinson University*, 227 NLRB 239 (1976) (order clarifying certification).

[14] One commentator notes:

> "Knowledgeable observers would probably conclude that in the cases decided thus far all the department chairmen functioned in approximately the same way. Yet the Board vacillates. One knowledgeable observer considers these Board decisions the prime example of the failure of the adjudicatory process [citition omitted]." Moore, *The Determination of Bargaining Units for College Faculties*, 37 U. Pitt. L. Rev. 43, 50 (1975).

p. 95), unaccompanied by even an attempt to explain why the several decisions relied upon by the University did not require exclusion of the department chairmen [15] or, indeed, by any discussion as to which factors are central to the existence of supervisory authority. The muddled state of Board law in this area requires not deference by the courts, but rather the closest critical scrutiny. The Petitioner submits that department chairmen have traditionally played a critical role in the day-to-day functioning of American universities. Absent direction by this Court, the Board will continue to disrupt the orderly administration of the nation's mature universities by virtue of its unprincipled, haphazard decisions.

The central inquiry under § 2(11) is whether department chairmen have authority derived from the administration to alter the employment conditions of other employees.[16]

[15] See, for example, *Long Island Universtiy (C. W. Post Center), supra; Long Island University (Brooklyn Center), supra; Adelphi University, supra; Syracuse University, supra;* and *Fairleigh Dickinson University,* 205 NLRB 673 (1973).

[16] Section 14(a) of the National Labor Relations Act commands exclusion from an appropriate bargaining unit "supervisory" employees, defined by § 2(11) as:

> ". . . any individual(s) having authority, in the interest of the employer, to hire, transfer, suspend, . . . assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

It is settled that § 2(11) is to be read disjunctively, with the exercise of any one of the enumerated statutory powers sufficient to confer supervisory status upon the employee. *NLRB v. Magnesium Casting Co.*, 427 F. 2d 114, 117 (1st Cir. 1970). Moreover, the possession of supervisory authority, and not the frequency of its exercise, is controlling. *Ohio Power Co. v. NLRB*, 176 F. 2d 385 (6th Cir. 1949), *cert. denied*, 338 U.S. 899 (1949). Finally, the legislative history of § 2(11) discloses that the supervisory exclusion was designed to avoid not only dilution of the union's bargaining strength but also the unacceptable conflicts of interest inevitably created by the inclusion in a bargaining unit of individuals who have the authority effectively to influence the employment status of other employees. (See *infra*, pp. 27-28.)

The question of whether the mere consultation with faculty, which is characteristic of the collegial system, deprives department chairmen of supervisory status, raises this inquiry from the realm of a mere factual dispute to one which presents a legal issue going to the very essence of the university system. While some chairmen may choose to consult with their department faculty on a regular basis in the running of their departments, it is submitted that the variety of approaches employed reflects a difference in style and not a diminution of authority. Indeed, the very fact that a *department chairman chooses* his own style speaks for his authority. Whether chairmen run their departments democratically or autocratically, with extensive or little consultation, does not divest them of the supervisory power they have. The record reflects both their authority and their differing styles in using that authority: the two should not be blurred in determining their status as supervisors or managerial employees who must be excluded from a unit of faculty.

Nothing in either the University By-laws or the Faculty Manual requires the department chairmen to act only upon the "advice and consent" of departmental faculty; to the contrary, the chairmen alone are responsible for recommending appointment, salary adjustments, and promotion of faculty members. Indeed, the record establishes that department chairmen typically recommend salary adjustments without consulting the faculty. Moreover, those recommendations, which are prepared following consultation with the faculty, reflect the *chairman's* own independent judgment and evaluation of the candidate's qualifications.

By the same token, the chairmen act on behalf of the University and cannot be considered mere instruments or agents of the faculty. Thus, chairmen are appointed by the administration, rather than elected by the faculty; attend regularly scheduled administrative meetings in which faculty members do not participate, wherein policy questions, including curriculum, budget priorities and the like, are considered; and represent the administration in adjusting faculty grievances, allocating among faculty the funds available for merit raises, and implementing administrative directives. In view of the chairmen's extensive authority, derived from the administration, to affect the employment conditions of departmental faculty and staff and the potential conflicts of interest and risks of dominance presented by their inclusion in a faculty unit, § 2(11) commands their exclusion as supervisory employees.[17]

Nonetheless, the Board, adopting *pro forma* the findings of its Regional Director, insists that department chairmen are not supervisors largely because the record allegedly disclosed:

> ". . . collective rather than authoritarian action, most of which is not only reviewable on the higher administrative levels,[18] but which in significant numbers of

[17] Alternatively, the University submits that, in view of their significant role in the formulation and implementation of policy, department chairmen are "managerial" employees similarly excludable from the faculty unit. *NLRB v. Bell Aeorospace Co.*, 416 U.S. 267 (1974).

[18] The Board is apparently operating under a misconception that review by higher management of an individual's recommendations is inconsistent with the notion that such recommendations are accorded substantial weight and are therefore "effective" within the meaning of § 2(11). Nothing in either § 2(11) or its legislative history requires that a supervisor have final managerial authority — only that he possess "authority . . . effectively to recommend" management action. See, *e.g., NLRB v. Metropolitan Life Ins. Co.*,

> cases has been shown to be ineffective . . ." (Appendix C, *infra*, pp. 94-95).

Consultation with the faculty does not, as the Board suggests, dictate a conclusion that subsequent recommendations merely reflect the consensus of the individuals consulted. On the contrary, the By-Laws and Faculty Manual neither require chairmen merely to ascertain and implement the collective will of the faculty nor otherwise significantly circumscribe their independent judgment and discretion.

The irrationality of the Board's determination is most graphically illustrated by the absurdly high supervisory ratios between the acknowledged supervisors (the deans) and the teaching staff which result from the Board's refusal to treat department chairmen as supervisors. For example, in the College of Liberal Arts the resulting ratio is 122 to 1! Indeed, the Board has repeatedly considered the supervisor/employee ratio to be a significant factor in determining supervisory status.[19] The Board's apparent notion that faculty consultation forecloses recognition of a chairman's supervisory or managerial authority suggests that the supervisory status of deans, vice presidents and even the president of the institution may be questioned with equal cogency.

Indeed, if "collegiality" is perverted by the Board to include supervisory department chairmen in faculty units, then universities throughout the country may well be forced

405 F. 2d 1169, 1177 (2d Cir. 1968) ("The power to recommend promotion is of course not the power actually to promote and consequently promotion recommendations will always be subject to review by those who, in fact, have the final power to promote").

[19] See, *e.g., Weather Seal Inc.*, 161 NLRB 1226, 1233 (1966) ("incredible to believe" that one supervisor could supervise 35 employees); *Russel S. Kribs Associates, Inc.*, 181 NLRB 1009, 1111 (1970) ("A ratio of 35 rank-and-file employees to one supervisor points strongly to the supervisory status of [the contested individuals]").

to sacrifice the basic academic principle of collegiality in order to preserve the integrity of supervisory authority. Alternatively, if universities cannot rely upon the undivided loyalties of individuals who play such an important role in the formulation and execution of policy, there may be no reason for the continued existence of the department chairman's position.

The effect of this decision, if not reversed, is to force Boston University to change its basic system of administration to conform to the Board's misconceptions about university life. For this University or any university which is subject to the vagaries of Board decisions to have to alter its practices to fit the Board's vacillating view of academia is unfair to the University, its faculty, and to the public at large. This situation warrants review by the Court.

3. *The Board's Rule that Department Chairmen Who Admittedly Exercise Supervisory Authority over Non-unit Employees Do Not Qualify as Supervisors Solely Because the Exercise Thereof Consumes Less than 50% of the Chairman's Time Conflicts with the Language and Legislative History of Section 2(11).*

The record clearly establishes that department chairmen exercise supervisory authority over non-unit employees. The University's contention that such a showing in and of itself required the exclusion of the chairmen as "supervisors" was rejected by the Board because the Board found that the exercise of such authority consumed less than 50% of a chairman's time.

The Circuit Court inexplicably and erroneously found that the Board did not rely on the 50% rule in Boston University's case (Appendix A, *infra*, p. 44 at fn. 4).[20]

[20] The Court went on to state that it "intimate[d] no view as to the validity of the rule where supervisory time closely approaches or exceeds 50%." Compare *NLRB v. Mercy College*, in which the Second Circuit, while not ruling on the "legal justification" of the 50% rule, underscored the "difficult" questions presented:

> "The questions raised are difficult, *e.g.*, whether there is legal justification for the Board's so-called 50 per cent rule, and, if there is, whether it applies equally to the supervisory, managerial and administrative categories. And here there is the additional complexity of applying terms from the ordinary industrial hierachy [sic] to the university context." 536 F. 2d 544, 550 (2d Cir. 1976).

This finding directly contradicts the Board's clear statement — "[N]or does the fact that they [department chairmen] exercise some of the requisite authorities over support and non-unit personnel change this conclusion [that department chairmen are not supervisors], as time spent in such exercise is far from the requisite fifty percent" (Appendix C, *infra*, p. 95).

The 50% rule defies the language and legislative history of § 2(11) and also conflicts with established judicial precedent. Nothing in the literal language of § 2(11) discloses a purpose to distinguish between supervision of "unit" and "non-unit" employees. Instead, § 2(11) defines "supervisor" merely as an individual with authority to direct "*other employees.*" If Congress intended to attach controlling significance to the identity of the "employees" supervised, then it could easily have so provided by appropriately restrictive language. Congress' failure to do so, we submit, is persuasive evidence that an individual who satisfies the § 2(11) criteria is a "supervisor" whether he directs "unit" or "non-unit" employees. *See Automobile Club of Missouri*, 209 NLRB 614 at 616-617 (Member Kennedy, dissenting). *Cf. Mourning v. NLRB*, 559 F. 2d 768 (D.C. Cir. 1977). Nor, we submit, does the legislative history of § 2(11) afford the Board solace. In reviewing the pre-1947 Board law in which the issue of "divided loyalty" of unionized supervisors was initially presented, the House Report states:

"The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the Act. . . . It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to *loyal representatives* in the plant . . . . What the bill does is to say what the law always has said . . . : That no one, whether employer or employee need have as his agent one who is obligated to those on the other side or one whom for any reason, he does not trust . . . ." 1 *Legislative History of the Labor Management Relations Act*, 1947, at 305, 308 (House Report No. 245 on H. R. 3020).

Of similar effect is the Senate Report.[21]

". . . [T]he bill does not prevent anyone from organizing nor does it prohibit any employer recognizing a union of foremen. It merely relieves employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees." *Legislative History*, p. 411.

Compare 2 *Legislative History of Labor Management Relations Act*, 1947, pp. 1008-1009 (Remarks of Senator Taft).

In short, the legislative history establishes a broad Congressional concern with supervisory "conflict of interest" or "divided loyalty" that was in no manner limited to supervision of unit, rather than non-unit, employees.

The imposition by the Board of a percentage figure on top of its unit/non-unit distinction only serves to emphasize the Board's drastic break with precedent.[22] Thus,

[21] 1 *Legislative History of Labor Management Relations Act*, 1947, pp. 409-411 (Senate Report No. 105 on S. 1126).

[22] See *Amalgamated Clothing Wkrs. of America*, 210 NLRB 928, 932-933 (1974) (Chairman Miller and Member Kennedy, dissenting).

the Board, with court approval, has uniformly ruled that *possession* of supervisory power, rather than the frequency of its exercise, is controlling. See, *e.g.*, *Ohio Power Co. v. NLRB*, 176 F. 2d 385, 388 (6th Cir. 1949), *cert. denied*, 338 U.S. 899 (Section 2(11) "does not require the exercise of the power described for all or any definite part of the employee's time. It is the existence of the power which determines the classification.")

Perhaps more significantly, the Board's 50% rule is at odds with its long-established policy that individuals who regularly—albeit infrequently—substitute for supervisors are themselves statutory supervisors excludable from rank-and-file units.[23] It is the *responsibility* for the supervision of employees that is alone dispositive; thus, a supervisor is no less a supervisor merely because he has only infrequent occasion to exercise his authority.

While the application of the Board's 50% rule in any context defies the language and legislative history of § 2 (11) and conflicts with established judicial and Board precedent, the Petitioner submits that its application to the academic world is totally unsupportable. The Board's 50% rule had its genesis in *Great Western Sugar Company*, 137 NLRB 551 (1962), which establishes that individuals employed in a seasonal industry who devote the major part of their work year to the performance of rank-and-file duties, but who exercise supervisory authority for a portion of the year should be included in the rank-and-file unit.[24] Significantly, the Board distinguished the

[23] See, *e.g.*, *Swift & Company*, 129 NLRB 1391, 1392 (1961); *Sewell, Inc.*, 207 NLRB 325, 331 (1973). *Minnesota and Ontario Paper Co.*, 92 NLRB 711, 713-714 (1950).

[24] Members Rodgers and Leedom dissented in *Great Western Sugar Company*, observing that the "dual status" individuals

". . . probably wish to retain not only their supervisory status, but also the protection of the Act when they engage in union

seasonal supervisors from "those individuals who spend a part of each working day or week as supervisors" 137 NLRB at 552. Subsequently, in *Westinghouse Electric Corporation,* 163 NLRB 723, (1967), *enforced,* 424 F. 2d 1151 (7th Cir. 1970), a case involving a unit of professional engineers, the Board, relying on *Great Western,* refused to deny employee status to engineers who spent less than 50% of the year as lead engineers at construction projects where they performed some supervisory duties in view of the fact that they spent the greater part of the year at the employer's headquarters performing no supervisory duties. As the Board explained:

> ". . . [T]he supervisory jobs which the senior engineers may be called upon to perform are not regularly and closely intermingled with their nonsupervisory work activity. Rather, depending on the Employer's assignment, their status shifts, full-time, from supervisory to nonsupervisory work for a measurable and continuous period of time, and *their duties in each position are sharply demarcated,*" 163 NLRB at 727 (emphasis added).

As the underscored language indicates, the *Westinghouse* rationale contemplates a sharp demarcation between the supervisory and nonsupervisory duties performed by those "dual status" individuals who can be considered "employees." It is significant that also at issue in *Westinghouse* was the status of the engineers who spent all of the year at construction sites working as lead engineers.

activities. Whatever their desires, *the fact remains that there exists an inherent conflict in their position* . . . . Stated somewhat differently, management must have agents and representatives in whom it can repose trust and confidence; and so must a union. *And it matters not that certain individuals are supervisors for only 3 to 4 months of the time* . . ." 137 NLRB at 556 (emphasis added).

The Board specifically excluded, as supervisors, the lead engineers who were permanently assigned to construction sites without requiring any showing that supervising nonprofessionals took up 50% of their time. In fact, the strong inference is that their supervisory duties were only incidental to their primary role as engineers.[25]

The Board's holding that the professional engineers who were permanently assigned to construction sites where they regularly spent a part of their time supervising nonprofessionals were supervisors requires a finding that department chairmen who regularly spend a part of their time supervising non-unit employees be treated as supervisors. Nevertheless, the Board introduced the 50% rule to the academic setting in *Adelphi University,* 195 NLRB 639 (1972), where it relied on *Westinghouse* to include in a faculty unit a director of admissions who exercised the "requisite" supervisory authority over a non-unit secretary.

Whatever the legitimacy of the 50% rule in the context of *Great Western Sugar Company* or *Westinghouse,* its application in *Adelphi University* and *Boston University* was plainly unwarranted.[26] The explicit ration-

[25] "The status of engineers assigned as leadmen on labor contract projects poses a more difficult issue. It is true, as the Petitioner points out, that a *substantial portion* of their work is primarily professional in character. However, we are satisfied that they also have *certain special* duties and responsibilities, *vis-a-vis* the craftsmen employed by the Employer for the project work, that are clearly supervisory in character. In these circumstances we find, in agreement with the Employer, that when engaged as lead engineers on labor contract projects, the individuals so assigned have supervisory status within the meaning of the Act" (emphasis added) 163 NLRB at 726.

[26] It is extraordinary that faculty appear to be the only individuals with on-going supervisory responsibilities against whom the rule has been applied. One commentator has noted on this issue: ". . . the Board has directly contradicted itself in nonfaculty University

ale of the doctrine, as articulated in *Westinghouse,* was that dual status individuals who performed "sharply demarcated" supervisory and nonsupervisory duties at different "measurable and continuous period[s] of time" should not be denied collective bargaining rights altogether. Quite clearly, department chairmen do not perform "sharply demarcated" supervisory and nonsupervisory duties at measurably different times during the year. On the contrary, their supervisory and nonsupervisory functions cannot be so neatly compartmentalized. The over 70 department chairmen at Boston University have a continuing supervisory relationship with several hundred support and non-unit personnel—a relationship which raises a continuing potential of a "conflict of interest" or "division of loyalty." To illustrate, the chairmen at Boston University exercise virtual control over the hiring of the nearly 1,200 part-time faculty whom the Board excluded from the unit. In the event of an administrative directive to save money by recruiting part-time faculty, department chairmen will inevitably be required to act against the interests of their full-time faculty colleagues, creating suspicion of their motives by labor and management alike—the very difficulty which the supervisory exclusion was designed to avert.[27] In short, contrary to the Board's unsupported speculation in *Adelphi,*[28] the po-

cases . . ." citing *Claremont Colleges,* 198 NLRB 811 (1972) and *University of Chicago Library,* 13-CA-11447, *modified;* 205 NLRB No. 44 (1972). Kahn, *N.L.R.B. and Higher Education,* 21 U.C.L.A. L. Rev. 63, 130.

[27] The opportunity to save substantial amounts of money by substituting part-time faculty for full-time has been an issue at other universities. Kahn, *supra,* 21 U.C.L.A. Law Rev. 63, 117, at n. 193.

[28] The Board stated in *Adelphi:*

"No danger of conflict of interest within the unit is presented, nor does the infrequent exercise of supervisory authority so ally such an employee with management as to create a more

tential conflicts of interest are not significantly diminished merely because the supervised employees are not members of the unit. Moreover, the Board's observation in *Adelphi* that individuals should be included in a rank-and-file unit if they do not have their "principal interests so allied with management as to establish a differentiation between them and other employees in the unit" ignores the fact that § 2(11) requires only that supervisors *act* "in the interest of the employer"—not that they *share* management's "principal interests."

For the Board to draw a distinction between supervising unit and non-unit employees and then to couple it with a percentage test conflicts with the letter and spirit of § 2 (11) as well as with Board and judicial precedent, and imposes the considerable burden of measuring with serviceable precision the hours of employment devoted to supervision. The validity of the 50% rule and particularly its application to the academic world presents an important question in the administration of the Act; one which, we submit, warrants review by this Court.

generalized conflict of interest of the type envisioned by Congress in adopting Section 2(11) of the Act." 195 NLRB at 644).

Conclusion.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A.

United States Court of Appeals
For the First Circuit

No. 77-1143

TRUSTEES OF BOSTON UNIVERSITY,
PETITIONER,
v.
NATIONAL LABOR RELATIONS BOARD,
RESPONDENT,
and
BOSTON UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
INTERVENOR.

No. 77-1365

BOSTON UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
PETITIONER,
v.
NATIONAL LABOR RELATIONS BOARD,
RESPONDENT,
and
TRUSTEES OF BOSTON UNIVERSITY,
INTERVENOR.

ON PETITION FOR REVIEW OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

No. 77-1226

TRUSTEES OF BOSTON UNIVERSITY,
PLAINTIFF-APPELLANT,
v.
NATIONAL LABOR RELATIONS BOARD,
DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. FRANK J. MURRAY, *U.S. District Judge*]

Before COFFIN, *Chief Judge*
CAMPBELL, *Circuit Judge*,
BOWNES, *Circuit Judge*

Alan S. Miller, with whom *Stoneman, Chandler, & Miller* was on brief, for Trustees of Boston University, petitioner in 77-1143.
Woodley B. Osborne, with whom *David M. Rabban* and *Matthew Finkin* were on brief, for Boston University Chapter, American Association of University Professors, petitioner in 77-1365.
Richard W. Gleeson, with whom *Stoneman, Chandler & Miller* were on brief, for Trustees of Boston University, appellant in 77-1226.
Patrick J. Szymanski, attorney, with whom *John S. Irving*, General Counsel, *John E. Higgins, Jr.*, Deputy General Counsel, *Carl L. Taylor*, Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel, *Aileen A. Armstrong*, Assistant General Counsel for Special Litigation, *Robert G. Sewell*, and *Linda Dreeben*, attorneys, were on briefs, for National Labor Relations Board.

April 13, 1978

BOWNES, *Circuit Judge*. The three cases before us all present issues which developed during the union organizational campaign and subsequent National Labor Relations Board certification election and as a result of Boston University's objections to the election and consequent failure to bargain with the Union. The union involved is the American Association of University Professors (AAUP) and its Boston University chapter. The issues are:

1. Whether the Board abused its discretion in finding that the University's department chairpersons are neither supervisors within the meaning of Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11), nor

managerial employees, *see NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974);

2. Whether the Board abused its discretion in excluding the faculties of law, medicine, and dentistry and part-time faculty from the bargaining unit;

3. Whether the Board erred in overruling the University's objection that an article in the April, 1975, issue of the AAUP Bulletin critical of the President of the University amounted to conduct which unfairly affected the election;

4. Whether the district court erred in ruling that material gathered by the Board during the course of its investigation of the University's objections to the certification election were exempt from the Freedom of Information Act under Exemption 7(A), 5 U.S.C. § 552(b)(7)(A); and

5. Whether the Board erred in denying the Union's request for attorney's fees, giving retroactive effect to any negotiated agreement, and other extraordinary relief.

PROCEDURAL HISTORY

On October 18, 1974, the Union filed a petition with the Board for a representation election in a unit which was defined at the hearing as a unit of approximately 850 "full-time teaching faculty . . . , including department chairmen, certain academic program directors, nursing coordinators, faculty on leave and part-time faculty who have tenure or are on the tenure track at the University's Charles River campus, excluding faculty of the Law School, the Medical School, and the School of Graduate Dentistry." The University contended that department chairpersons should have been excluded from the bargaining unit and the faculty from the three professional schools and part-time faculty should have been included.

The Regional Director issued his decision on April 17, 1975, finding that the department chairmen were neither supervisors nor managerial employees and that the part-time faculty and the faculties of the three professional

schools in question did not share a community of interest with the other faculties sufficient to require their inclusion.[1] Other points decided by the Regional Director are not before us.

The Regional Director directed an election and the Board denied the University's request for review. The election was held on May 14, and the ballot count on June 3 showed the Union the winner, 394-262, with 40 challenged ballots.

The University filed objections and supplemental objections contending that an article in the *AAUP Bulletin* misrepresented Boston University President John Silber's role in the firing of a professor at Texas University when Silber was Dean of its College of Arts and Sciences. The University requested a hearing on its objections, and the

[1] The unit found appropriate was:

All full-time teaching members of the faculty at Boston University, including department and division chairmen, area chairmen in the School of Theology, sequence coordinators in the School of Social Work, coordinators in the School of Nursing, the director of the Teacher Training Project in Sargent College, the directors of the African Studies Center, the Afro-American Studies Program, the Center for Latin-American Development Studies, the American and New England Studies Program, the Center for Applied Social Science, the Boston University Center for the Philosophy and History of Science, the Continuing Education Department in the School of Nursing, the University Professors Program, faculty on leave (who are visiting faculty at another education institution and who are otherwise eligible), and faculty in the Overseas Program (who taught at the University immediately prior to taking assignment in said Overseas Program for a definite period of time and who are expected to return to the school or college of the University in Boston from which they came), but excluding all part-time faculty, all officers of the University, deans, associate deans, assistant deans, administrative support personnel, nonteaching professionals, librarians, graduate assistants, teaching fellows, student employees, nonprofessional employees, coaches (who are not otherwise eligible for inclusion), directors of the schools of music, visual arts and theatre arts in the school for the Arts, visiting faculty, all faculty, department chairmen and program directors in the Schools of Law, Medicine and Graduate Dentistry, all other employees, guards and supervisors as defined in the Act.

Union requested attorney's fees on the ground that the University's objections were frivolous.

After an administrative investigation, the Regional Director issued a supplemental decision, dated August 13, finding that the alleged misrepresentations were not sufficient to set aside the election even if found to be as alleged and, therefore, certified the Union as the collective bargaining agent for the unit. The Board denied review because the request for review "raised no substantial issues," but declined to award attorney's fees.

On August 7, the University refused to bargain with the Union as the exclusive bargaining agent for the unit. The Union filed an unfair labor practice charge, and the General Counsel issued a complaint on October 8 charging the University with refusing to bargain with a certified bargaining agent in violation of sections 8(a)(1) and (5) of the NLRA. The University's answer admitted the failure to bargain, but raised the affirmative defense that the Regional Director had erred in failing to include the three professional school faculty in the bargaining unit, in including the department chairpersons, and in overruling its election objections. In response to the General Counsel's motion for summary judgment on the issues, the Board issued a notice to show cause why the motion should not be granted. The Union filed a motion for specific relief on December 17, asking for an order requiring the University to give retroactive effect to any agreement regarding salaries or fringe benefits, to pay costs of attorney's fees and other litigation expenses, and several other extraordinary remedies in addition to the usual prospective bargaining order.

The University requested and received two extensions of time so that its answer to the notice to show cause would have been due on January 15. It filed its answer to the notice to show cause on December 2, opposing summary judgment for the reasons indicated earlier. The Board

granted the motion for summary judgment.

On January 12, the University filed a complaint in the United States District Court for the District of Massachusetts requesting that the Board (pursuant to the Freedom of Information Act, 5 U.S.C. § 522) be ordered to divulge information which it had collected in its investigation of the University's election complaint. The district court, after issuing and then dissolving a temporary restraining order, found that the information sought by the University should not be disclosed.

These three cases stem from the University's petition to review and set aside the order of the Board and the Board's cross-petition for enforcement of its order, the Union's petition for review of the denial of extraordinary relief, and the University's appeal from the order of the district court.

THE NATIONAL LABOR RELATIONS BOARD AND ITS ROLE IN HIGHER EDUCATION

The Board ended its longtime policy of refusing to take jurisdiction over nonprofit higher educational institutions in *Cornell University*, 183 NLRB 329, 331 (1970). *See Columbia University*, 97 NLRB 424 (1951). This court first faced the significant questions which arise from the assertion of jurisdiction over post secondary institutions in *NLRB* v. *Wentworth Institute*, 515 F.2d 550 (1st Cir. 1975). In that case, we considered and answered in the affirmative the questions of whether an institution of higher education was an "employer" under the National Labor Relations Act, section 2(2), 29 U.S.C. § 152(2), and whether the institution's faculty were employees within the meaning of section 2(3), rather than supervisor's under section 2(11), 29 U.S.C. § 152(3) and (11).

In considering this major policy change by the Board, we recognized that: "The declared purpose of the Act is to eliminate obstructions upon commerce caused by labor unrest . . . and in dealing with employer operations whose

effect upon commerce has grown over time the Board believes that it is endowed with discretion to exercise a fuller measure of its conferred jurisdiction." *Id.* at 554. In holding that Wentworth's faculty members were not managerial, we specifically refrained from "comment[ing] on the Board's developing views on the significance of a substantial faculty role in decisions on curricula, admissions, hiring, degree requirements, and other educational policy matters." *Id.* at 557. We must now address some of these matters, at least with respect to department chairpersons.

Since the Board's first entry into the field of higher education, the exposure of the nation's universities to organizational efforts has grown rapidly,[2] and the role of the Board in the University setting has engendered a great deal of comment and criticism.[3] Much has been made by

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[2] *See, e.g., Trustees of Boston University* v. *NLRB*, 548 F.2d 391 (1st Cir. 1977); *NLRB* v. *Mercy College*, 536 F.2d 544 (2d Cir. 1976); *NLRB* v. *Wentworth Institute*, *supra*, 515 F.2d 550; *University of Vermont and State Agricultural College*, 223 NLRB 423 (1976); *Yeshiva University*, 221 NLRB 1053 (1975), *enf't pd'g*, (2d Cir. No. 77-4182); *Rensselaer Polytechnic Institute*, 218 NLRB 1435 (1975); *Fordham University*, 214 NLRB 971 (1974); *University of Miami*, 213 NLRB 634 (1974); *Point Park College*, 209 NLRB 1064 (1974); *University of San Francisco*, 207 NLRB 12 (1973); *Fairleigh Dickinson University*, 205 NLRB 673 (1973); *University of Chicago Library*, 205 NLRB 220 (1973), *enf'd mem.*, 506 F.2d 1402 (7th Cir. 1974); *New York University*, 205 NLRB 4 (1973); *Syracuse University*, 204 NLRB 641 (1973); *The Catholic University of America*, 201 NLRB 929 (1973); *Rosary Hill College*, 202 NLRB 1137 (1973); *Claremont University Center*, 198 NLRB 811 (1973); *Tusculum College*, 199 NLRB 28 (1972); *Florida Southern College*, 196 NLRB 888 (1972); *Adelphi University*, 195 NLRB 639 (1972); *University of Detroit*, 193 NLRB 566 (1971); *Fordham University*, 193 NLRB 134 (1971); *University of New Haven, Inc.*, 190 NLRB 478 (1971); *Long Island University (Brooklyn Center)*, 189 NLRB 909 (1971); *C. W. Post Center of Long Island University*, 189 NLRB 904 (1971); *Cornell University*, *supra*, 183 NLRB 329.

[3] *See e.g., Kenneth Kahn, The NLRB and Higher Education: The Failure of Policy Making Through Adjudication*, 21 U.C.L.A. L. Rev. 63, 84-101. *See also NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 764-766 (1964); *Bell Aerospace* v. *NLRB*, 475 F.2d 485, 495-497 (2d Cir. 1973), *modified*, 416 U.S. 267 (1974).

the Board's critics of the special governance structure in universities and the general inapplicability of its rules developed for private industry to the academic community, and the University here has, quite understandably, seized on this general criticism to support its case. We are bound to observe that some of the problems that arise in academia might better be addressed by rulemaking than by an *ad hoc*, case-by-case determination. But we must also note that the Board's transfer of its private industry experience and rules to the university setting was only natural and is consistent with the common law method of applying time-tested legal principles to new situations.

ARE DEPARTMENT CHAIRPERSONS SUPERVISORS WITHIN THE MEANING OF SECTION 2(11) OF THE NATIONAL LABOR RELATIONS ACT OR MANAGERIAL EMPLOYEES?

Section 2(11) of the NLRA requires exclusion of "supervisory" employees from collective bargaining units and defines a "supervisory" employee as

> any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Board found that the department chairpersons were "employees" rather than "supervisors" and thus properly included in the bargaining unit.

Our analysis of whether chairpersons are excluded supervisors or managerial employees looks to the degree of control exercised by chairpersons over other bargaining unit personnel and the relative amount of interest they have in furthering the policy of the administration as opposed to the members of the bargaining unit.

The question of who are supervisors or managerial employees is one of fact for the Board, *Stop & Shop Companies, Inc.* v. *NLRB*, 548 F.2d 17, 18 (1st Cir. 1977); *NLRB* v. *Magnesium Casting Co.*, 427 F.2d 114, 117 (1st Cir. 1970), *aff'd*, 401 U.S. 137 (1971), and the expertise of the Board in dealing with the gradations of authority between "supervisors" and "employees" can be so subtle that determining who is a supervisor must "as a practical matter" involve "a large measure of informed discretion." *Swift & Co.*, *supra*, 292 F.2d at 563.

In this case, the Board's determination that the department chairpersons did not exercise supervisory authority over unit personnel and that whatever supervisory authority they did exercise over nonunit, support personnel was insufficient to render them supervisors, must be upheld.

Keeping in mind the substantial evidence test, our review of the record discloses the following facts which supply a firm footing to the Board's findings. The appointment and reappointment of full-time faculty is by approval of the trustees upon the written recommendation of the president, the academic vice-president, and the dean concerned. The department chairperson makes a recommendation, which is followed more often than not, "only after consultation by him with all full professors with tenure of that Department." Faculty Manual, Pet. Ex. 43 (p. VII-2). Although there are varying procedures used by the over eighty chairpersons, the department chairperson's recommendation, as is the case in other universities, is the result of such consultation. Reappointment, promotion, and discipline of the faculty are finally determined by the President and Board of Trustees based on recommendations by the department chairperson who consults with and usually obtains the consensus of the tenured faculty members of the department. In each of these areas, the Board was entitled to find that the chairperson's recommendations were not "effective" or that he/she was acting "in the interest" of the faculty, not of the employer.

While department chairpersons are selected by the appropriate dean, the selection is usually based on a consensus of the faculty of the department. The Board could also have found that the chairpersons were not acting as supervisors with respect to their department budgets since they lacked discretion in formulating them. Based on this evidence, the Board was warranted in finding that the department chairpersons are not supervisors. Indeed, the selection process for department chairpersons is such that they represent the interests of the tenured professors of the department rather than the University.

The record also amply supports the Board's finding that University chairpersons spend less than 50% of their time supervising nonunit employees.[4] The chairperson is normally a member of the department who takes on the assignment for varying periods of time without losing standing in the department. A frequent career step for a department chairperson is to return to a position as full-time professor.

DID THE BOARD ABUSE ITS DISCRETION IN EXCLUDING THE FACULTIES OF THE SCHOOLS OF LAW, GRADUATE DENTISTRY, AND MEDICINE AND PART-TIME FACULTY FROM THE BARGAINING UNIT?

The determination of the composition of a bargaining unit is almost entirely a factual determination for the

[4] Boston University objects to the Board's use of the 50% rule on two grounds: one, that there is not substantial evidence in the record to support its finding that department chairpersons actually devoted less than 50% of their time to supervision, and two, that the rule is unrealistic and unworkable in a university setting and should be invalidated as a matter of law. We think that the record amply supports the finding of the Board that the time spent in supervisory duties "reached a maximum of five to ten percent among the many chairmen who testified." In this case, the Board did not rely on the 50% rule. We intimate no view as to the validity of the rule where the supervisory time closely approaches or exceeds 50%.

Board. *South Prairie Construction Co.* v. *Operating Engineers*, 425 U.S. 800 (1976); *NLRB* v. *Diamond Standard Fuel Corp.*, 437 F.2d 1163 (1st Cir. 1971). We have said that a unit which the Board finds appropriate is entitled to stand unless it is a "crude gerrymander." *S. D. Warren Co.* v. *NLRB*, 353 F.2d 494, 498 (1st Cir. 1965), *cert. denied*, 383 U.S. 958 (1966). The party opposing the Board's unit determination must show that the unit selected is "clearly not appropriate." *Banco Credito* v. *NLRB*, 390 F.2d 110, 112 (1st Cir.), *cert. denied*, 393 U.S. 832 (1968).

The University's best case with respect to the exclusion of the three professional school faculties lies with the School of Law. Unlike the Schools of Medicine and Graduate Dentistry, the law school is on the University's main, Charles River, campus. It shares a building with another school which was included in the bargaining unit, the School of Education, and its dean reports to the same academic vice-president as do most of the schools which are in the bargaining unit. None of these factors apply to the other two excluded schools. The Schools of Graduate Dentistry and Medicine are on a separate campus, approximately a mile away from the main campus, and report to the Academic Vice-President for Health Affairs.[5] As a result of these differences, there is relatively little interaction between the faculty members from the Schools of Graduate Dentistry and Medicine and the members of the bargaining unit as compared with the School of Law.

The Board's determination concerning the School of Law was neither novel nor unfounded.[6] The principal fault

[5] Several other schools which were included in the bargaining unit also report to the Academic Vice-President for Health Affairs. They are: School of Nursing, School of Social Work, Sargent College of Allied Health Professions.

[6] Some other decisions in which law schools were kept out of university faculty units in varying circumstances are: *University of Miami, supra*, 213 NLRB 634; *University of San Francisco,*

which can be found with its determination is that some of the reasons given for separating the law school from the other Charles River campus schools would be equally applicable to the University's other professional schools, e.g., the Schools of Engineering, Public Communications, Management, and, perhaps, even the Schools of Fine Arts, Nursing, and Sargent College of Allied Health. Each of these schools occupies a separate building less centrally located on the campus than the one occupied by the School of Education and the School of Law. However, we do not review the Board's decision *de novo*, but must determine only if it has abused its discretion. *Diamond Standard, supra*, 437 F.2d at 1164; *S.D. Warren Co., supra*, 353 F.2d 494; *Swift & Co., supra*, 292 F.2d at 563. It can be argued, based on the above factors, that the Board should have included the law school and, perhaps even the Schools of Graduate Dentistry and Medicine within the bargaining unit. But these facts can also be used to argue that the Board should have excluded the other professional schools. *See Fordham University, supra*, 193 NLRB 134. But, however viewed, these facts do not establish conclusively that the Schools of Law, Graduate Dentistry and Medicine must be part of the bargaining unit.

Moreover, there are significant differences between the law school and the other graduate schools included in the bargaining unit. It occupies its own segment of the building which it shares with the School of Education with a separate entrance and separate lobby and elevators. The dean of the law school, not the University Space Planning Committee, controls the assignment of rooms and space in the law school area. It has its own admissions office and registrar and keeps its own records. The law school has a

supra, 207 NLRB 12; *Catholic University, supra*, 201 NLRB 929; *Fordham University, supra*, 193 NLRB 134. In *Fairleigh-Dickinson, supra*, 205 NLRB 673, the Board included the dental faculty in a unit of university faculty.

separate library in a separate building with access only through buildings or areas controlled by it. It makes independent recommendations for financial aid, has a separate academic calendar and a distinct and separate graduation ceremony.

The law school, like the Schools of Dentistry and Medicine, has significant independent resources, although its budget is reviewed in the same manner as the other schools. Its endowment, exceeded only by the School of Medicine and Dentistry in the entire University, is the largest of any of the schools on the Charles River campus. The law school maintains its own fund raising mechanism, and it does not divide contributions with the University as do the other schools on the main campus. These differences are important elements in determining what the faculties of the respective schools can realistically expect from collective bargaining.

The difference in faculty salaries between the law school and the included schools must have played a key role in the Board's decision. While the average salary for law professors is $27,000, the average salary for all Charles River campus professors, including the law school, is approximately $17,000. We must also take judicial notice of the fact that many law school professors are able to supplement their incomes either by the practice of law, publishing legal material or other legally related activities.

Tenure, one of the most important quasi-economic issues for bargaining, is obtained on the average in three years at the law school while it takes approximately six years at the other Charles River Campus schools.[7]

Viewed as a whole, we cannot say that the Board's decision as to the law school was arbitrary or not based on

[7] We do not think that the testimony that the law school faculty maintains closer ties to its profession than that of the other schools is particularly helpful. Nor do we consider faculty luncheon customs of probative value on this issue.

substantial evidence. Since the Schools of Medicine and Graduate Dentistry are physically separate from the main campus and since all of the factors discussed as to the law school are even more applicable to them, it follows that the Board's ruling is sustained as to them.

THE PART-TIME FACULTY

The Board excluded all part-time faculty. Since its decision in *New York University, supra,* 205 NLRB 4, 6, 7, it has consistently excluded all part-time faculty not employed in "tenure track" positions.[8] The Board found that "generally only full-time members are eligible [for tenure]." The reason for the exclusionary rule is that they have "no mutuality of interest [with full-time faculty in] (1) compensation, (2) participation in University Government, (3) eligibility for tenure, and (4) working conditions." *New York University, supra,* 205 NLRB at 6-7. To this we add that the part-time faculty do not share the same benefit package nor are they generally as dependent on the University either for financial support or for continuing their careers and life style. These reasons, and others cited by the Board, are more than sufficient to sustain the exclusion of part-time faculty from the bargaining unit.

DID THE BOARD ABUSE ITS DISCRETION IN OVERRULING THE UNIVERSITY'S ELECTION OBJECTION WITH RESPECT TO AN ARTICLE CONCERNING PRESIDENT JOHN SILBER IN THE AAUP BULLETIN?

One of the lead articles appearing in the *AAUP Bulletin* in April of 1975 was a book review by Alan Grob entitled "Invasion In Austin." The book under review, "Our

[8] Decisions in which part-time faculty have been included in the unit are all cases prior to *New York University, supra,* 205 NLRB 4. Since then, the policy has been to keep the part-time faculty excluded from the collective bargaining units of full-time faculty. *See University of San Francisco, supra,* 207 NLRB 12; *Yeshiva University, supra,* 221 NLRB 1058.

Invaded Universities," has portrayed John Silber, now President of Boston University and then Dean of Arts and Sciences at Texas University, in a favorable light. Professor Grob's article was critical of the portrait and accused Silber of unfairly interfering with the rights of an instructor in an employment dispute with the University of Texas. The University claims that the article was, at the least, inaccurate and, at the most, a deliberate distortion of the truth. It asserts that, since it did not learn of the article until May 8 and the election was scheduled and held on May 14, it had no opportunity to reply to the charges. The Board's policy has been to set aside an election where there has been a material misrepresentation of fact made by one who had special knowledge or was in a position to know the true facts and where there was no opportunity to correct the misrepresentation of fact made by one who had special knowledge or was in a position to know the true facts and where there was no opportunity to correct the misrepresentation before the election. *Celanese Corporation of America* v. *NLRB,* 291 F.2d 224, 226 (7th Cir. 1961).

Had this article been published in another setting, we might well find that it impaired the employees' freedom of choice in the election, but it was published in a union organ by a writer who had no personal knowledge of the facts. *See NLRB* v. *Gilmore Industries, Inc.,* 341 F.2d 240, 241 (6th Cir. 1965); *NLRB* v. *Houston Chronicle Publishing Co.,* 300 F.2d 237 (5th Cir. 1962); *NLRB* v. *Shirlington Supermarket,* 224 F.2d 649 (4th Cir.), *cert. denied,* 350 U.S. 914 (1955). It concerned an event that took place seven to eight years prior in a different University. The voters in this election were as sophisticated and literate a group as ever votes in a union certification election, and they had the advantage of four and one-third years of experience under the administration of the man criticized

in the article. One of the circumstances which we must take into account is the sophistication of the work force involved. In *Modine Manufacturing Company*, 203 NLRB 527 (1973), *enforced*, 500 F.2d 914 (8th Cir. 1974), the Board stated:

> We must, we think, be allowed a reasonably broad area of discretion in judging whether the alleged misrepresentation is *prima facie* sufficient to justify either a hearing or a rerun election. There are many intangibles going into such a judgment. We may, for example, take into account the current degree of sophistication of the voters at a particular time or in a particular area of the country. We may also call into play the expertise we develop in observing through our own eyes and through the eyes of regional personnel indirectly involved in the conduct of some 9,000 elections a year. For we are faced in each case with a judgment both as to how material alleged misrepresentations in a given subject area may be in a particular place and in a background of the tenor of the particular time. We may also appropriately bear in mind the character of the particular work force involved and what we observe to be the reputation and the relative strength of the employer or the labor organization alleged to have made a material misrepresentation. *Id.* at 531.

Given this particular unit and the time span, there is no reason why the article should have prejudiced the faculty or influenced its voting unfairly.

FREEDOM OF INFORMATION ACT ISSUE

The fourth issue is whether the University is entitled to material gleaned by the Board in its investigation of the University's objections to the Board certification election. The Board argues, and the district court found, that the information which is sought comes within Exemption 7(A) of the Freedom of Information Act. We have previously

decided two cases on the question of the FOIA's applicability to information garnered during an investigation of an unfair labor practice charge, *New England Medical Center* v. *NLRB*, 548 F.2d 377 (1st Cir. 1976), and *Goodfriend Western Corp.* v. *Fuchs*, 535 F.2d 145 (1st Cir.), *cert. denied*, 429 U.S. 834 (1976). Because of the extensive analysis in *New England Medical Center* and in *Title Guarantee Co.* v. *NLRB*, 534 F.2d 484 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976), we deal only with the arguments which the University advances in attempting to distinguish this case from those cited above.[9]

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[9] In *Robbins Tire and Rubber Co.* v. *NLRB*, 563 F.2d 724 (5th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3511 (2/21/78), the Fifth Circuit considered a similar situation to the ones here and in *New England Medical Center*, *Goodfriend Western Corp.*, and *Title Guarantee* and held that it could not

> agree with the Board's assertion that disclosure of witnesses' statements would inevitably interefere with enforcement proceedings even in the sense that it would always allow litigants greater discovery than they otherwise would obtain. *Robbins Tire and Rubber Co.*, *supra*, 563 F.2d at 730.

However, the Fifth Circuit has consistently ordered broader discovery than the Board is generally willing to grant and broader than has been forced on the Board by other circuits. *See e.g.*, *NLRB* v. *Rex Disposables*, 494 F.2d 588, 592 (5th Cir. 1974); *NLRB* v. *Miami Coca-Cola Bottling Co.*, 403 F.2d 994 (5th Cir. 1968); *NLRB* v. *Safway Steel Scaffolds Co.*, 383 F.2d 273 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968). *See also Charlotte-Mecklenburg Hospital Authority* v. *Lowell W. Perry, Chairman of the Equal Opportunity Commission, etc.*, Nos. 76-2272 and 2273 (4th Cir. April 4, 1977). *Compare NLRB* v. *Hardeman Garment Corp.*, 557 F.2d 559 (6th Cir. 1977); *New England Medical Center*, *supra*, 548 F.2d at 383; *Roger J. Au & Son, Inc.* v. *NLRB*, 538 F.2d 80 (3d Cir. 1976); *NLRB* v. *Martin A. Gleason, Inc.*, 534 F.2d 466, 481 (2d Cir. 1976); *Combs* v. *State of Tenn.*, 530 F.2d 695 (6th Cir.), *cert. denied*, 96 S.Ct. 1731 (1976); *D'Youville Manor* v. *NLRB*, 526 F.2d 3, 7 (1st Cir. 1975); *NLRB* v. *Lizdale Knitting Mills, Inc.*, 523 F.2d 978 (2d Cir. 1975); *NLRB* v. *Interboro Contractors, Inc.*, 432 F.2d 854, 859-869 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971); *Electromec Design and Development Co.* v. *NLRB*, 409 F.2d 631, 635 (9th Cir. 1965).

We have read *Charlotte-Mecklenburg Hospital Authority* v. *Perry*, 16 F.E.P. 680 (4th Cir. Jan. 26, 1978), submitted by the attorney

Boston University attempts to distinguish its case from *New England Medical Center* and *Goodfriend Western Corporation* on the basis that it seeks only material and facts which were gathered pursuant to the University's objection to the Board certification election, not the material gathered pursuant to the unfair labor practice charges made by the Union as was the situation in the cited cases. At the outset, we note that the factors bearing on the "closed" election objection files are little different from those concerning the "closed" unfair labor practice charge in *New England Medical Center, supra,* 548 F.2d at 385-387.

The University itself points out in its brief that the election objection case and the pending enforcement and unfair labor practice actions are really one and the same when it asserts that the "principal purpose in seeking the information is an unfair labor practice case in which the university is the respondent." Brief at 10, 25. In its brief at pages 19-20, the University states:

> The only way the University can obtain judicial review of the representation proceeding, the conduct of which the University has objected to numerous times, is by refusing to bargain with the Board-certified union. . . . The pending enforcement proceeding against Boston University . . . is, in essence, a procedural device to test the Board's certification . . . .

Thus, the University's argument that the case is closed and that the Board's case can no longer be frustrated by revealing the contents of its files is internally inconsistent. As the Tenth Circuit said in *AMF Head* v. *NLRB,* 564 F.2d 374, 375 (10th Cir. 1977):

for Boston University. We are also aware that the United States Supreme Court has granted certiorari in the Fifth Circuit case, *Robbins Tire and Rubber Co.* v. *NLRB, supra.* Since the rule in this circuit has been well established, we continue to adhere to it.

> It would be anomalous indeed for us to hold at this juncture that the exemption ceases to protect once the proceedings before the NLRB have ended, for this is not the end of the enforcement proceedings. To hold in accordance with the argument of the AMF Head Division would mean that the F.O.I.A. machinery could be used for the purpose of obtaining information in aid of the review of the unfair labor practice proceedings in this court. Various evidence would be tendered in this, an appellate court, in an effort to obtain a reversal. Thus, the discovery effort would be employed to affect the outcome of the enforcement proceedings. It is to be noted at the time of the trial court's decision that the present body of law had not developed. Furthermore, there is no assurance that the NLRB cause will not be remanded to that Board for further proceedings.

Even if we remand, the appropriate procedure would be for the University, if it still wants the information, to return to the Board and make a new request for the information on the basis of the new factual situation. Review of this new determination would, of course, be available in the district court. *See New England Medical Center, supra,* 548 F.2d at 387 (denial of rehearing).

While we concur in part with the University's contention that "employee fear" is not a significant element of this case because the materials sought are not employee statements, we remain unconvinced that the sound reasons which underlie the decisions cited above are inapplicable here. The principal question here is not one of protecting the sanctity of statements made by employees with an expectation of confidentiality.[10] The key question in exam-

[10] The Board in its FOIA brief at pages 21-26 argues the applicability of Exemption 5:

> (5) inter-agency or intra-agency memorandums or letters

ining the claim under 7(A) "is whether production would 'interfere' with the pending enforcement proceeding," *New England Medical Center, supra,* 548 F.2d at 382, or upset the " 'delicate' . . . balance existing between employer and employee in labor proceedings." *Id.* at 387, citing *Title Guarantee, supra,* 534 F.2d at 492. We think it would. The University's objection to the Board's certification of the election is a closed file only in the most technical sense since the University has announced its intention to rely on its objections as a defense to the unfair labor practices charge. If the University is permitted to see the Board's files from the election case, the University will be able to determine the boundaries of the Board's information; that, in turn, "will 'interfere' with Board proceedings by enabling a possible violator to construct defenses." *New England Medical Center, supra,* 548 F.2d at 386. Here, "the closed file documents remain fully relevant to a specific pending enforcement proceeding, although, to be sure, not the one for which they were precisely intended." *Id.* at 385.

DID THE BOARD ERR IN DENYING THE UNION'S REQUEST FOR EXTRAORDINARY RELIEF?

The Union attacks as insufficient the Board's prospective bargaining order and complains that it erred in denying its request for extraordinary relief. Its complaint is based on the premise that the University's appeals were dilatory and frivolous, designed only to avoid its statutory obligation to bargain with the duly elected Union.

Because of the Board's *ad hoc* and, at times, inconsistent rulings in cases involving higher institutions of learning, we cannot say that the position of the University was either frivolous or dilatory.

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which would not be available by law to a party other than an agency in litigation with the agency.

Because of our findings with regard to Exemption 7(A), no discussion of Exemption 5 is necessary.

The question of whether chairpersons are employees or supervisors has always been a difficult one for the Board, and the determination of the composition of a bargaining unit in a university setting remains unsettled and may never be susceptible of a fixed rule.

While we do not look with favor upon the attempt by attorneys to use the Freedom of Information Act as a discovery tool, we have become resigned to the fact that it has now become almost a matter of rote to assert it in cases involving government agencies.

The orders of the National Labor Relations Board in Nos. 77-1143 and 77-1375 are to be enforced, and the district court is affirmed in No. 77-1226.

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.

Appendix B.

MJP

228 NLRB No. 120

D-1925
Boston, Mass.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRUSTEES OF BOSTON UNIVERSITY
and
BOSTON UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

Case 1-CA-11061

DECISION AND ORDER

Upon a charge filed on September 23, 1975, by Boston University Chapter, American Association of University Professors, herein called the Union, and duly served on Trustees of Boston University, herein called the Respondent, the Acting General Counsel of the National Labor Relations Board, herein called General Counsel, by the Regional Director for Region 1, issued a complaint on October 8, 1975, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance, and the record shows, that on August

13, 1975, following a Board election in Case 1-RC-13564 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about August 27, 1975, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On November 4, 1975, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On November 28, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on December 12, 1975, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On December 17, 1975, the Union filed a motion that the Board, in ruling on the Motion for Summary Judgment, grant, in addition to a bargaining order, certain specific relief. Respondent requested and received two extensions of time to file a response to the Notice to Show Cause, the last extension setting January 15, 1976, as the date for receipt of its response.

On January 13, 1976, the United States District Court for the District of Massachusetts issued an order temporarily restraining the Board from requiring a response to

[1] Official notice is taken of the record in the representation proceeding, Case 1-RC-13564, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

the Notice To Show Cause and from all other proceedings herein until further order.[2] On April 8, 1976, unaware of the court's order, the Board inadvertently issued a Decision and Order in these proceedings. When the court's temporary restraining order was called to its attention, the Board, on April 13, 1976, issued an Order vacating that Decision and Order. On April 19, 1976, the Board filed a motion with the district court to have the temporary restraining order set aside and on October 28, 1976, renewed its motion. On November 12, 1976, the district court dissolved the restraining order.

Thereafter, on November 16, 1976, Respondent requested a due date for its response to the Notice To Show Cause and the Board set December 1, 1976, as the due date. The response was filed on December 2, 1976. On December 30, 1976, the Union renewed its motion for specific relief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent, in substance, (1) attacks the validity of the certification based on its unit contentions and its objections to the election; (2) contends for the first time that faculty are managerial employees; and (3) argues that a hearing (a) should have been held on its objections because of the Regional Director's failure to conduct an adequate investigation and (b) should now be held to receive newly discovered and previously

[2] *Trustees of Boston University* v. *N.L.R.B.*, Civil Action 76-115-M.

unavailable evidence. The General Counsel contends that the Respondent seeks to relitigate issues resolved in the prior representation case and has raised no issue requiring a hearing. We agree.

Review of the record, including that of the representation proceeding, Case 1-RC-13564, establishes that, after a hearing, the Regional Director on April 17, 1975, issued a Decision and Direction of Election ordering an election in the appropriate unit of all full-time teaching members of the Respondent's faculty. Subsequently, Respondent filed a timely request for review and a brief in support, arguing that, contrary to the Regional Director's decision, (1) department chairmen and directors of academic programs and centers were supervisors or managerial employees and should be excluded from the unit and (2) all part-time faculty and the faculty of the schools of law, medicine, and dentistry should be included. By telegram of May 13, 1975, the Board denied Respondent's request for review as raising no substantial issues warranting review.[3]

An election by manual and mail ballots was held. On June 3, 1975, the manual and mail ballots were commingled and counted. The tally of ballots showed 394 votes cast for the Union, 262 against, and 40 challenged ballots. Respondent filed timely objections to the election and supplemental objections, alleging in substance that (1) the Board breached its responsibility to conduct an election at a time and in a manner which would afford the maximum number of faculty the opportunity to vote,[4] and (2) last-minute

[3] Members Kennedy and Penello dissented from certain inclusions and exclusions.

[4] The breach allegedly arose in that the election was conducted after the close of classes, should have been entirely by mail ballot, and did not accord overseas faculty sufficient time to receive and return mail ballots.

union misrepresentations were contained in a book review in the Spring issue of the "AAUP Bulletin" (Vol. 61, No. 1), charging the Respondent's president with violations of academic freedom in 1968-69 while he was dean of the college of Arts and Sciences at the University of Texas. Subsequently, Respondent requested a hearing on its objections. The Union filed a response requesting attorney's fees and costs on the grounds that Respondent's objections were frivolous. After investigation, the Acting Regional Director issued his Supplemental Decision and Certification of Representative on August 13, 1975, denying Respondent's hearing request and overruling its objections. With respect to the conduct of the election, the Regional Director found that (1) at the time the date and method of election were established there was no evidence that participation would be inadequate and, in any event, there was adequate participation and (2) the fact that some overseas faculty members were not able to timely cast mail ballots did not warrant setting aside the election since these ballots were insufficient to affect the election results. Regarding the alleged misrepresentations, the Regional Director found that, even assuming Respondent had no opportunity to respond, (1) the alleged misrepresentations were not so substantial as to warrant setting aside the election; (2) the book review charging the Respondent's president with violations of academic freedom constituted opinion and would not be viewed as a statement of fact by such a sophisticated electorate; and (3) the events described therein were too remote in time and place to have a substantial and significant impact on the voters, especially since Respondent's president had held that position for over 4 years at the time of the election.

Accordingly, the Acting Regional Director certified the Union.

Respondent filed a request for review reiterating its objections and seeking a hearing based on (1) its objections, (2) the Regional Director's failure to conduct a meaningful and thorough investigation of its objections, and (3) its contention that, due to the fact that the Board has not acquired a level of expertise in dealing with faculty members equivalent to its expertise in an industrial setting, the factors outlined in *Modine*,[5] which permit the Board to make informed decisions without hearings on typical misrepresentations in industrial cases, were not present here. The Union filed an opposition and also requested review of its request for attorney's fees and costs because of Respondent's frivolous objections — a request upon which the Acting Regional Director did not rule. On September 17, 1975, the Board by telegram denied Respondent's request for review for lack of substantial issues warranting review and declined to award attorney's fees and costs to the Union on the grounds that the objections filed, though not meritorious, were not frivolous or otherwise warranting the award of such fees and costs.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representa-

[5] *Modine Manufacturing Company*, 203 NLRB 527 (1973).

[6] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

tion proceeding,[7] and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence,[8] nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.[9] We shall, accordingly, grant the Motion for Summary Judgment.

[7] In its response to the Notice to Show Cause Respondent contends for the first time that the faculty are managerial employees excluded from coverage of the Act. In the representation case where Respondent argued that a unit of all faculty was appropriate, Respondent raised the issue of managerial status only with respect to department chairmen and directors, which contention was rejected. As the contention that all faculty are managerial employees could have been raised in the representation case, Respondent may not litigate that issue in these proceedings.

[8] In its response to the Notice to Show Cause, Respondent contends that October and November 1975 correspondence disclosing a reply by the book's author to the review, which the Union declined to publish in a postelection issue of its magazine, constitutes previously unavailable and newly discovered evidence since it reflects the continuing significance of the controversy and the Union's recognition of the gravity of its misrepresentations. Assuming, arguendo, the accuracy of this evidence, we are not persuaded that it would affect the determination to overrule the misrepresentation objection or would warrant a hearing thereon.

[9] In its answer to the complaint, Respondent specifically denies the status of the Union as a labor organization, the appropriateness of the unit, and the allegations with respect to the Union's representative status. In the underlying representation proceeding, Case 1-RC-13564, the Union's status as a labor organization within the meaning of Sec. 2(5) of the Act was determined and, accordingly, it is not subject to litigation in the instant unfair labor practice proceeding. Similarly, Respondent litigated the unit appropriateness and the Union's representative status in the representation case and may not relitigate them here.

In its motion for specific relief, the Union requests that the Board, in addition to the usual bargaining order entered in refusal-to-bargain cases, issue an order that all contract provisions involving salaries or fringe benefits be retroactive and further require Respondent to supply information for bargaining, to mail any order issued herein to each member of the unit and of Respondent's board of trustees, and to pay costs and attorney's fees because of Respondent's frivolous objections and refusal to bargain. We decline to grant the Union's request for such extraordinary relief.

By its request for retroactivity of certain contract provisions, the Union in affect is asking the Board to establish the effective date of the contract with respect to these terms. Since the Board is without power to compel parties to agree to any such substantive provision of a collective-bargaining agreement, we shall deny this request.[10] Likewise, we will not grant the Union's request for an order that Respondent supply bargaining information since an employer is under no obligation to furnish information in the absence of an actual request therefor and here there was no such request.[11]

In the prior representation case, the Board rejected the Union's request for attorney's fees and costs on the grounds that Respondent's election objections were not frivolous. Since Respondent's defense herein, based upon its objections, is not patently frivolous, we hereby deny the request for payment of costs and attorney's fees.[12]

[10] *H. K. Porter Co., Inc.* v. *N.L.R.B.*, 397 U.S. 99 (1970).

[11] *A. H. Belo Corporation* (*WFAA-TV*) v. *N.L.R.B.*, 411 F.2d 959 (C.A. 5, 1969), cert. denied 396 U.S. 1007 (1970), enfg. 170 NLRB 1558 (1968).

[12] *Heck's Inc.*, 215 NLRB 765 (1974). Nor does Respondent's allegedly frivolous Freedom of Information Act request warrant a different conclusion.

Finally, since there is herein no pattern of widespread and pervasive unlawful conduct requiring individual reassurance that the statutory rights of employees are protected, we decline the request for additional mailings of the Board order.[13]

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent is and has been at all times material herein a Massachusetts corporation with its principal office and place of business at 147 Bay State Road, Boston, Massachusetts (herein called the Charles River Campus), and is now and continuously has been engaged at said campus in the operation of a nonprofit educational institution from which it derives an unrestricted annual gross income exceeding $1 million. Also, Respondent receives directly in Massachusetts from points outside Massachusetts supplies and materials having an annual value exceeding $50,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Boston University Chapter, American Association of University Professors, is a labor organization within the meaning of Section 2(5) of the Act.

[13] *Cyntell Tool Company*, 196 NLRB 1032 (1972), distinguishing *H. W. Elson Bottling Company*, 155 NLRB 714 (1965) (cited by the Union).

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent employed at its Charles River Campus constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time teaching members of the faculty at Boston University, including department and division chairmen, area chairmen in the School of Theology, sequence coordinators in the School of Social Work, coordinators in the School of Nursing, the director of the Teacher Training Project in Sargent College, the directors of the African Studies Center, the Afro-American Studies Program, the Center for Latin-American Development Studies, the American and New England Studies Program, the Center for Applied Social Science, the Boston University Center for the Philosophy and History of Science, the Continuing Education Department in the School of Nursing, the University Professors Program, faculty on leave (who are visiting faculty at another educational institution and who are otherwise eligible), and faculty in the Overseas Program (who taught at the University immediately prior to taking assignment in said Overseas Program for a definite period of time and who are expected to return to the school or college of the University in Boston from which they came), but excluding all part-time faculty, all officers of the University, deans, associate deans, assistant deans, administrative support personnel, non-teaching professionals, librarians, graduate assistants, teaching fellows, student employees, non-professional employees, coaches (who are not otherwise eligible for inclusion), directors of the schools of music, visual arts and theatre arts in the School for the Arts, visiting faculty, all faculty, department chairmen and program directors in the Schools of Law, Medicine and Graduate Dentistry, all other employees, guards and supervisors as defined in the Act.

2. The certification

On May 14, 1975, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 1, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on August 13, 1975, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about August 20, 1975, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about August 27, 1975, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since August 27, 1975, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and

that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in Section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Trustees of Boston University is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Boston University Chapter, American Association of University Professors, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time teaching members of the faculty at Boston University, including department and division chairmen, area chairmen in the School of Theology, sequence coordinators in the School of Social Work, coordinators in the School of Nursing, the director of the Teacher Training Project in Sargent College, the directors of the African Studies Center, the Afro-American Studies Program, the Center for Latin-American Development Studies, the American and New England Studies Program, the Center for Applied Social Science, the Boston University Center for the Philosophy and History of Science, the Continuing Education Department in the School of Nursing, the University Professors Program, faculty on leave (who are visiting faculty at another educational institution and who are otherwise eligible), and faculty in the Overseas Program (who taught at the University immediately prior to taking assignment in said Overseas Program for a definite period of time and who are expected to return to the school or college of the University in Boston from which they came), but excluding all part-time faculty, all officers of the University, deans, associate deans, assistant deans, administrative support personnel, non-teaching professionals, librarians, graduate assistants, teaching fellows, stu-

dent employees, non-professional employees, coaches (who are not otherwise eligible for inclusion), directors of the schools of music, visual arts and theatre arts in the School for the Arts, visiting faculty, all faculty, department chairmen and program directors in the Schools of Law, Medicine and Graduate Dentistry, all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since August 13, 1975, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 27, 1975, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board

hereby orders that Respondent, Trustees of Boston University, Boston, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Boston University Chapter, American Association of University Professors, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time teaching members of the faculty at Boston University, including department and division chairmen, area chairmen in the School of Theology, sequence coordinators in the School of Social Work, coordinators in the School of Nursing, the director of the Teacher Training Project in Sargent College, the directors of the African Studies Center, the Afro-American Studies Program, the Center for Latin-American Development Studies, the American and New England Studies Program, the Center for Applied Social Science, the Boston University Center for the Philosophy and History of Science, the Continuing Education Department in the School of Nursing, the University Professors Program, faculty on leave (who are visiting faculty at another educational institution and who are otherwise eligible), and faculty in the Overseas Program (who taught at the University immediately prior to taking assignment in said Overseas Program for a definite period of time and who are expected to return to the school or college of the University in Boston from which they came), but excluding all part-time faculty, all officers of the University, deans, associate deans, assistant deans, administrative

support personnel, non-teaching professionals, librarians, graduate assistants, teaching fellows, student employees, non-professional employees, coaches (who are not otherwise eligible for inclusion), directors of the schools of music, visual arts and theatre arts in the School for the Arts, visiting faculty, all faculty, department chairmen and program directors in the Schools of Law, Medicine and Graduate Dentistry, all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Boston, Massachusetts, campus copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

[14] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. March 22, 1977

Betty Southard Murphy, Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Boston University Chapter, American Association of University Professors, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time teaching members of the faculty at Boston University, including department and division chairmen, area chairmen in the School of Theology, sequence coordinators in the School of Social Work, coordinators in the School of Nursing, the director of the Teacher Training Project in Sargent College, the directors of the African Studies Center, the Afro-American Studies Program, the Center for Latin-American Development Studies, the American and New England Studies Program, the Center for Applied Social Science, the Boston University Center for the Philosophy and History of Science, the Continuing Education Department in the School of Nursing, the University Professors Program, faculty on leave (who are visiting faculty at another educational institution and who are otherwise eligible), and faculty in the Overseas Program (who taught at the University immediately prior to taking assignment in said Overseas Program for a definite period of time and who are expected to return to the school or college of the University in Boston from which they came), but excluding all part-time faculty, all officers of the University, deans, associate deans, assistant deans, administrative support personnel, non-teaching professionals, librarians, graduate assistants, teaching fellows, student employees, non-professional employees, coaches (who are not otherwise eligible for inclusion), directors of the

schools of music, visual arts and theatre arts in the School for the Arts, visiting faculty, all faculty, department chairmen and program directors in the Schools of Law, Medicine and Graduate Dentistry, all other employees, guards and supervisors as defined in the Act.

TRUSTEES OF BOSTON UNIVERSITY

(Employer)

Dated By

(Representative) (Title)

This is an official notice and must not be defaced by any one.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 12th Floor, 99 High Street, Boston, Massachusetts 02110, Telephone 617-223-3348.

Appendix C.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
FIRST REGION

CASE NO. 1-RC-13,564

In the Matter of

TRUSTEES OF BOSTON UNIVERSITY
Employer [1]

and

BOSTON UNIVERSITY CHAPTER,
AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing [2] was held be-

[1] The name of the Employer appears as amended at the hearing.

[2] After the close of the hearing, the University moved to reopen the record to receive evidence, not available at the time of the hearing, in the form of statements allegedly made by two union officials, who are also faculty members of the University, published in a student-operated newspaper distributed throughout the University community. The University contends that from these statements it can be concluded that: (1) the Petitioner believes part-time faculty have a community of interest with the full-time faculty, contrary to its position at the hearing that no such community of interest existed, and (2) that the extent of organization of the faculty of Boston University is of controlling significance to the principal officers of the petitioning union in respect to those groups it seeks to exclude from the unit.

fore a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.[3]

Assuming *arguendo*, that the statements allegedly made are true, and that the alleged conclusions may properly be drawn from such statements.

(1) The findings made regarding the composition of the unit herein are based on facts established in the record and applicable Board precedent. Absent a stipulation of the parties, what their individual views may be is not considered in making such findings.

(2) Section 9(c)(5) states: "In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling". In *N.L.R.B. v. Metropolitan Life Insurance Company*, 380 U.S. 438, the court stated, in substance, that extent of organization may be taken into consideration, together with other factors, provided of course, that it is not the governing factor. The unit found appropriate herein is based on an extensive factual record and established Board precedent. Even if the alleged evidence were to prove that Petitioner's motive in seeking the unit encompassed by its position is guided by the extent to which the union has organized, it is immaterial so long as the Board in its choice of an appropriate unit, does not give controlling weight to that fact. *Allied Stores of New York, Inc. d/b/a Stearns, Paramus*, 150 NLRB 799, 807.

Accordingly the motion is denied.

[3] The Employer declined to stipulate that Petitioner is a labor organization within the meaning of Section 2(5) of the Act, on the grounds that a minority of members may oppose Petitioner's collective bargaining objective, and that it may not have filed certain reports required by law. The record is clear and uncontradicted that Petitioner, a Chapter of the National American Association of University Professors, in existence since the early

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Trustees of Boston University, colloquially known as Boston University (the University, herein) is a private, non-profit educational institution, incorporated under the laws of the Commonwealth of Massachusetts, with offices and principal academic facilities located in two sections of Boston. The Charles River Campus, approximately a mile and a quarter in length, covering over forty-five acres, contains fourteen of the University's sixteen schools and colleges. They are, College of Liberal Arts, Graduate School, School of Education, School of Management, College of Basic Studies, College of Engineering, School for the Arts, School of Public Communications, School for Social Work, Metropolitan College, School of Theology, School of Law, School of Nursing, and Sargent College of Allied Health Professions. Approximately a mile and a quarter distant, on the opposite side of the City, is the Boston University Medical Center containing the School of Medicine, School of Graduate Dentistry and University Hospital. The University also conducts an Overseas Program involving 23 faculty members in 35 programs at 24 European locations, primarily on military bases. At the Boston campuses there are approximately 24,500 students,

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1950's, has adopted by majority vote of its membership as one of its purposes, the representation of faculty members for purposes of collective bargaining with the University and has articulated and demonstrated willingness to fulfill these functions. Failure to file reports does not affect this status. See *Labor-Management Reporting and Disclosure Act of 1959, Section 603 (b)*. Accordingly, it is found that Petitioner is a labor organization within the meaning of the Act. *Alto Plastics Manufacturing Corp.*, 138 NLRB 850, 851-852; *"M" System, Inc.*, 115 NLRB 1316, n. 2.

involving the services of approximately 4500 employees, of whom some 2200 are instructional personnel.

The School of Theology, School of Law, School of Medicine, School of Social Work and the Graduate School confer only graduate degrees. The College of Basic Studies is a two-year undergraduate program and the College of Liberal Arts has only an undergraduate program. All other schools have both undergraduate and graduate programs.

Petitioner seeks a unit of approximately 850 full-time teaching faculty on the University payroll, including department chairmen, certain academic program directors, nursing coordinators, faculty on leave and part-time faculty who have tenure or are on the tenure track at the University's Charles River Campus, excluding faculty of the Law School, the Medical School and the School of Graduate Dentistry.

The University contends that the appropriate unit should include all full-time instructional faculty and all part-time instructional faculty on the University payroll, who are in a status of three-quarter time or more, or who have voting rights in the faculty senate, but would exclude department and divisional chairmen, certain academic program directors, and nursing coordinators.

The parties have agreed to the following exclusions from any unit found to be appropriate: all officers of the University, deans, associate deans, assistant deans, administrative support personnel (including office clericals and guards), all non-teaching professionals (including librarians), graduate assistants, teaching fellows, student employees, all non-professional employees, all individuals with the title "coach" who are not otherwise eligible for inclusion, department chairmen at the School of Medicine and the School of Graduate Dentistry, directors of the

schools of music, visual arts and theatre arts in the School for the Arts, and academic program directors at the School of Law, School of Medicine and the School of Graduate Dentistry.

The parties have further agreed on the following inclusions in the unit found to be appropriate: area chairmen in the School of Theology, department chairmen in the Division of General Education, sequence coordinators in the School of Social Work, full-time teaching faculty who taught at the University immediately prior to taking assignment in the Overseas Program for a definite period of time and who are expected to return to the school or college of the University in Boston from which they come, and faculty on leave from the University, who are visiting faculty at another educational institution will be eligible to vote if otherwise eligible.

There being nothing in the facts supporting the above-stipulated exclusions and inclusions contrary to any provision of the statute or established Board policy, they are adopted and accordingly found to be appropriately excluded and included respectively.

Petitioner takes the position that it is willing to, and will participate in, an election in any unit found by the Board to be appropriate.

There is no history of collective bargaining involving any of the employees sought by the Petitioner or argued as inclusions by the University.

Department Chairmen:

The Petitioner would include, and the University would exclude as supervisory or managerial personnel, the following: 5 department chairmen in the School of Public Communications; 3 department chairmen in the School of Engineering; 7 department chairmen in the School of Management; 5 department chairmen, 3 division chair-

men and 1 director of the Teacher Training Project in Sargent College of Allied Health Professions; 12 department chairmen in the School of Education; 19 department chairmen in the College of Liberal Arts; 5 division chairmen in the College of Basic Studies; and 10 coordinators in the School of Nursing.[4]

There are no department or division chairmen or coordinators in the Graduate School or the School of Law, nor in Metropolitan College, and the parties have agreed to exclude department chairmen in the Medical School and School of Graduate Dentistry, the directors in the three schools in the School for the Arts, sequence coordinators in the School of Social Work and area chairmen in the School of Theology.

The general structure and authorities of the University are set forth in its by-laws which vest all ultimate authority in the members of the corporation, who, as trustees, elect the President of the University as the executive head of its administrative and educational system. The chairman of the corporation, trustees, President and treasurer comprise the *Executive Committee* which has authority to establish, increase and decrease the amount of salaries or other compensation to be paid to the officers and members of the faculty and other employees of the University, which authority may be delegated. The *University Council,* consisting of the President, vice-presidents, deans and such others as the President may appoint, is a body established generally to advise the President on broad matters of academic interest. It does not include department chairmen. The voting members of the several faculties constitute the membership of the *University Senate,* which considers matters affecting two or more schools

[4] Although titles may differ from school to school the term "chairman", as used hereinafter, applied to all disputed positions listed.

or colleges. *Deans* are elected for each school or college annually by the corporation upon the nomination of the President, hold office at his pleasure and are impressed with the responsibility for oversight of the work of the school or college of which they are deans. *Faculties* consist of all professors, associate professors, assistant professors and such other members of the teaching staff as may be designated by the dean and approved by the President and trustees. Faculty members are appointed by the corporation upon the written recommendation of the President, academic vice-president and the dean concerned. The by-laws further provide that each faculty shall have the authority to establish rules and regulations concerning the academic requirements of its school or college, with the approval of the dean and academic vice-president.

As might be assumed, within these broad guidelines, there have developed many distinctive factual variances in practice from school to school.

Whether an individual is an "employee"[5] within the meaning of the National Labor Relations Act, as amended, and thereby entitled to exercise the rights of "employees" as guaranteed in the Act,[6] or is a "supervisor" as de-

[5] Excluded from the definition of "employee" in Section 2(3) of the Act is ". . . any individual employed as a supervisor . . ."

[6] Section 7 of the Act states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

fined in the Act,[7] and thereby not accorded the rights and protection granted to "employees", is a frequently recurring, serious and often difficult issue to determine. It has been held that Section 2(11) is to be interpreted in the disjunctive and that "the possession of any one of the authorities listed in that section places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. N.L.R.B.*, 176 F. 2d 285; cert. den. 338 U.S. 899. The Board first asserted jurisdiction over private, non-profit colleges and universities in *Cornell University, et al.*, 183 NLRB 329, and was first called upon to make appropriate unit determinations in regard to university teaching staffs in *C.W. Post Center of Long Island University*, 189 NLRB 904, in which *inter alia*, the Board excluded department chairmen from the unit found appropriate therein, as supervisors, based upon findings that they exercised authority to make effective recommendations as to the hiring and change of status of faculty members and other employees. In the four years since *C.W. Post* the Board has had occasion to consider the supervisory or managerial status of department chairmen in at least twelve cases, excluding them as "supervisors" in five of these[8] and including them as "em-

[7] Section 2(11) of the Act: "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[8] Department chairmen were excluded in: *Long Island University (Brooklyn Center)*, 189 NLRB 909; *Adelphi University*, 195 NLRB 640; *Syracuse University*, 204 NLRB No. 85; *Farleigh Dickinson University*, 205 NLRB No. 101; *Point Park College*, 209 NLRB No. 152.

ployees" in others,[9] not always by unanimous decision, but based upon the specific facts in each case. As the Board stated in *Rosary Hill College*, 202 NLRB 1137, ". . . we are not persuaded, on the basis of our experience to date with university cases in which their supervisory status is in issue, that faculty department heads *generally* have or exercise supervisory authority as it is defined in the Act. And we see no reason at this time to depart from our usual practice of requiring an affirmative showing that the disputed faculty department heads have been given one or more of the indicia of supervisory authority set forth in Section 2(11), or that their recommendations affecting personnel status are relied on and generally followed."

The Faculty Manual, the updated status of which was introduced into evidence at the hearing, has as its expressed purpose ". . . to assist faculty members at Boston University . . . to become acquainted with the policies, regulations and procedures which affect their relationship with the University."

The Manual[10] requires that:

> "Whenever a Department Chairmanship becomes vacant the Dean of the School or College in which the Department is budgeted shall consult with all full-time faculty members of full professorial rank in that department to recommend a candidate for that position." And further: "A Department Chairman shall normally be appointed for a three year term which may be renewed."

[9] Department chairmen were included in: *Fordham University*, 193 NLRB 134; *University of Detroit*, 193 NLRB 566; *Tusculum College*, 199 NLRB 28; *Rosary Hill College*, 202 NLRB 1137; *New York University*, 205 NLRB No. 16; *University of Miami*, 213 NLRB No. 64; and *Fordham University*, 214 NLRB No. 137.

[10] VII-8.

This mandate has been generally followed, although the manner of its application has varied from school to school; some deans consulting directly, in varying degrees of formality, with faculty members, and some utilizing faculty search committees with varying degrees of complexity. Overall, there is a considerable amount of faculty input in the selection of department chairmen, whom the dean of the particular school eventually appoints, upon the approval of the President and trustees. Appointments have been made, in fact, for terms of one year, three years and some for indefinite terms, all being renewable and some having lasted for over a decade. There is some evidence that the current trend is generally toward two three year terms. As chairmen have relinquished that status, a number have progressed to higher administrative posts both at the University and at other colleges. However, there is also testimony, by a faculty member of long tenure, who has held the posts of both chairman and dean, that approximately three quarters of the former chairmen have returned to faculty status at the University.

There is no specific policy regarding extra compensation in recognition of a chairman's duties. However, in most schools the chairmen receive a stipend in the range of $1000 to $2000 in addition to their salaries, and those who do not are usually the highest or near highest paid members in the department, although not necessarily highest in academic rank, nor do all have tenure. In all cases, chairmen who have regular faculty appointments, have a teaching load that is reduced in some degree from the average carried by full-time faculty members in their departments. This is not unique, however, as some members of the faculty also have reduced teaching loads because of their participation in committee work and other academic activities.

The Faculty Manual requires[11] that persons deemed worthy of consideration for initial appointment as faculty members shall be recommended in writing to the dean by the chairman of the department or division involved, ". . . but only after consultation by him with all full professors with tenure of that Department or Division." This section emphasizes that "the requirements of consultation with the Faculty . . . shall apply to any appointment involving faculty status."

The record indicates that the consultative provision has been interpreted and applied, in practice, in a variety of ways. In the relatively smaller schools, as in the School of Engineering, the process is rather informal with the department chairman working closely with faculty members in the recruitment, screening, and interviewing process. As the dean of that school testified, virtually all of the chairmen's recommendations are accepted, "A good part of the reason for that being that there is a great deal of informal discussion prior to the submission of the formal forms." He further stated that negative decisions are generally worked out in an informal fashion and not put through the formal paperwork process. In other relatively larger schools, the procedure becomes more complex. In the history department of the College of Liberal Arts, the process involves an executive committee which meets with the curriculum committee to determine the need for new appointments. The possible new appointments are discussed at the first departmental meeting with the entire faculty. The executive committee and the department chairman then appoint an *ad hoc* search committee which recruits nationally for candidates and recommends a candidate, or a slate of two or three, to the executive committee, which reviews, interviews, con-

[11] VII-2.

siders and makes a selection. That selection, confirmed by vote of the department as a whole, then becomes the recommendation of the chairman.

Between these two procedural extremes lie the other departmental processes, all involving some faculty participation in recruitment, screening, interviewing and recommending. It is generally true that, upon selection, the chairman will discuss salary with the candidate. However, as one witness for the University testified, the range is well defined and the amount available is common knowledge between the chairman and the dean.

In hiring part-time faculty members, the Faculty Manual's consultative provision is less strictly adhered to. Among several reasons advanced for this less formal procedure are the exigencies attendant upon late August retirements, necessitating speed in selection to fulfill course commitments; the fact that many who are hired on this one semester to one year appointment basis are already known, having previously taught in the departments; and just prior to the opening of the Fall semester many faculty members are not available for consultation. In practice, therefore, it appears that more individual discretion is tolerated on the part of chairmen than in the hiring and retention of full-time members. However, there is conflicting testimony regarding the "normalcy" of this procedure. Although a few department chairmen testified that they conducted searches, interviewed and recommended the hiring of part-timers to their several deans on their own, others testified that, although their recommendations were effectively approved by their deans and the administrative chain of command, their recommendations were, in fact, based upon some faculty consultation, or ratification of their selection when faculty members were available, or having known the individual as having previously taught at the University.

The Faculty Manual sets forth the requirement of an annual evaluation of each faculty member, upon which is determined reappointment, promotion, salary increases, termination, tenure and relevant combinations of these changes in faculty status.[12] It further details certain criteria upon which the evaluation is to be based and certain procedures to be followed, including the requirement that the chairman consult with a faculty committee, which is impressed with the obligation of seeking information on the individual under evaluation from faculty members and students. As with the application of other manual mandates, various practices have developed with differing degrees of formality depending generally upon the size of the school and the type of action being taken.

In the areas of promotion, salary increases and tenure, the procedure followed in all schools, organized on a departmental basis (except in the Medical School) is basically the same. The University uses three forms, the first of which is used by the faculty member to request such personnel action, the second is used by the department chairman for his recommendation and the third is for the dean's own evaluation which is forwarded to central administration for the required ultimate action. Form One, the faculty member's request for action, must be accompanied by, or contain, extensively detailed information regarding such factors as his teaching, research, committee work, activity in professional organizations, counseling service to students, publications and works in progress. Upon receipt, the department chairman, in addition to evaluating the material submitted, is required to solicit and submit with his own recommendation, those recommendations of other faculty members, student evaluations, and if deemed necessary, evaluations from fac-

[12] VII-6.

ulty outside the department, school, and even from outside the University. The requirement for faculty input is stressed in the manual and in instructions accompanying Form Two. In practice in every school there is some form of faculty evaluation committee on a departmental or schoolwide basis or both, operating with varying degrees of formality including recommendations based upon faculty vote. Based upon the appellant's material in Form One and upon recommendations by faculty members or faculty committees, the chairman completes Form Two with his own recommendation, all of which is sent to the dean. The dean, upon his evaluation of all material, makes his own recommendation on Form Three and submits all recommendations and supportive evidence to the academic vice-president for further evaluation and administrative action. As the procedures are not uniform, the actions of the department chairmen vary from a *pro forma imprimatur* of faculty committee recommendations to individual opposition to such recommendations. In any event, there are many instances throughout the record where the chairman's recommendation has been contradicted or rejected by the dean, or by administrative officers on a higher level, including the President.

The Faculty Manual [13] provides procedures to be followed in the termination or suspension of both tenured and non-tenured faculty on both permanent and term appointments. Essentially, if a termination is not effected by mutual consent at the administrative level, an *ad hoc* committee elected by the Senate Council is entrusted with the inquiry. If this committee recommends, or the President believes, formal proceedings should be instituted, a formal hearing is conducted by a committee of faculty members, elected by the Senate Council, which eventually

[13] IX, *et seq.*

renders its decision, which is then reviewable by the Board of Trustees.

Salary adjustment recommendations are formulated by department chairmen, generally within a budget strategy previously adopted by the dean of the school or within guidelines promulgated by the administration or in some cases suggested by the faculty and adopted by the dean and chairman. Usually the strategy is determined to grant across-the-board increases, or merit increases, or in some cases a combination of both. When the merit system is being employed, the chairman makes his recommendations, supported by the annual evaluations, as previously described, and submits them to the dean. But in some instances, a salary equity committee is appointed by the dean to make recommendations; some departments have voted to delegate to the chairman the job of making salary recommendations; and occasionally the dean distributed increases without consulting with the chairman. In many cases where the chairman has made specific recommendations, the amounts have been increased or decreased or negated by the dean. In any event, if a faculty member is dissatisfied with his salary adjustment, he may resort to the formal grievance procedure described in the Faculty Manual.[14]

Department chairmen are assigned an operational budget, delineated line by line, which is the composite result of faculty suggestions and requests and proposals of the chairmen and their deans, tempered by discussion, and forged into reality by the central administrative review process. Chairmen are responsible for controlling expenditures within line items, but generally are required to get their deans' approval to cross budget lines, or to exceed approved expenditures within a category. Although

[14] VII-7.

chairmen have some discretion in the disbursement of funds from the travel line, usually to faculty members attending professional conventions to deliver papers, such expenditures are usually anticipated in the planning stage of the budget, are routinely approved, but on occasion are adjusted by the dean.

The Faculty Manual [15] establishes guidelines regarding the duties, powers and responsibilities of the faculty and refers, for particularity, to the By-Laws of the Corporation. The By-Laws [16] vest responsibility for the academic program in the faculty, and further indicate that their duties are delineated by agreement.[17] Although some deans' letters of notification of initial appointments refer faculty members to a department chairman for specific assignments, the member, through the previously described collegial process, has usually been selected for specific course assignment or assignment to courses in a given field. In practice, chairmen, with few exceptions, solicit faculty members' preferences both as to course and timing. The tentative schedules are usually discussed at faculty meetings to eliminate conflicts before being transmitted to the dean. Overall, the process of assignment and scheduling of courses appears to be a ministerial task, rather than one requiring the use of independent judgment.

Assignments to summer school courses are not manda-

[15] VI-1.

[16] Article VII, Section 2: "The courses of instruction in the several schools and colleges shall be prescribed by their several faculties, subject to the approval of the University Council and the President of the University.

[17] Article IV, Section 5: "Faculty members shall carry out teaching, research and other duties, and for such periods of the year as agreed upon with the Chairman of their respective departments of instruction, the Dean of their respective college and the Academic Vice-President concerned."

tory and are made only when a faculty member requests such assignment, or responds affirmatively to a solicitation to teach such courses. Chairmen rarely, if ever, audit a faculty member's classes and, if required, generally delegate this portion of the evaluation process to other faculty members. Academic freedom is formally acknowledged,[18] and there is no evidence of day-to-day control over a member's work generally. The selection of textbooks, method of teaching and the giving and grading of examinations are all done by the faculty members, either individually or jointly.

There have been few instances in which a department chairman has had reason to reprimand a faculty member. In each case it has been done orally, but the only action taken was by mention of the episode in the evaluation process, previously discussed, which could affect salary or effect termination. However, any punitive action in these areas is subject to an extensive appeal procedure. In cases where a student complains about a faculty member or there are differences between members, chairmen generally discuss the matter informally and usually resolve it. The record disclosed little evidence of chairmen's involvement in the resolution of specific grievances.

Although chairmen may grant very short periods of time off, usually in relation to a member's attendance at a professional convention, it is the member who, in fact, arranges for coverage of any commitments. More extensive leaves, including sabbaticals, with or without compensation are subject to an extensive appeal procedure as set forth in the Faculty Manual [19] and formal approval of all leaves is by vote of the Trustee Board on recommendation of the President.

[18] Faculty Manual VIII-1, 2.

[19] X-3.

Although chairmen have some voice in the selection of their secretaries, their actions and recommendations are subject to well established personnel policies and guidelines, and although responsible for their assignments, and direction of their work, time spent in such duties reached a maximum of five to ten percent among the many chairmen who testified.

Teaching fellows, graduate assistants and research assistants generally apply for such positions in their areas of concentration. Some chairmen merely refer them to a faculty member who is looking for assistance in that discipline and who has the final selection. Others work with a committee and ultimately come up with a joint recommendation. As salaries are fixed and their appointments are limited, there are no recommendations for other personnel action. They work with and under the direction of the faculty member who has selected them or to whom they are assigned.

Chairmen have regular faculty appointments and, unlike administrative officials, are carried in the budget code and paid like other faculty members, carry teaching responsibilities, albeit with reduced loads, do some committee work and advising of students and share the same fringe benefits as other full-time faculty. Most chairmen are listed in catalogues with faculty, rather than with administrative officers, are not always the highest paid, or highest ranking members of their departments, and some are untenured. Their terms are limited, and although a few have progressed to higher administrative positions, and a few have remained as chairmen for many years, the great majority of them return to regular faculty posts when their chairmanship ceases.

Based upon the above, particularly the facts that indicate collective rather than authoritarian action, most of

which is not only reviewable on the higher administrative levels, but which in significant numbers of cases has been shown to be ineffective, it is found that department chairmen are not supervisors within the meaning of the Act. Nor does the fact that they exercise some of the requisite authorities over support and non-unit personnel change this conclusion, as time spent in such exercise is far from the requisite fifty percent. Additional facts discussed above, regarding chairmen's classifications in budgets and catalogues and performing most of the duties of other full-time faculty, with the majority eventually returning to faculty ranks, leads to the conclusion that their interests are more akin to those of the regular faculty than to those of the administration. It is, therefore, further concluded that they are not managerial personnel. Accordingly, they are included in the unit found appropriate herein. *Fordham University,* 214 NLRB No. 137.

Part-time Faculty:

Petitioner would exclude all part-time faculty, excepting only those part-time faculty who are in tenure track positions, whereas the University would include all part-time faculty whose status is three-quarter time or more, or who have voting rights in the University Faculty Senate, and are on the University payroll. University records indicate that at the time of the hearing, of 2200 instructional faculty, there were 1030 full-time teaching faculty members and 99 in the part-time group sought to be included by the University. Of the 99, nine had both a three-quarter status and voting rights; fifteen had three-quarter status and no voting rights; and 75 had voting rights, but less than three-quarter status. The Schools of Basic Studies, Management, Nursing, Theology and the Graduate School and Metropolitan College had no part-timers, as defined by the University. The Schools of Law,

Medicine and Graduate Dentistry had one, thirty-five and fourteen, respectively. As the faculties of these latter three schools have been excluded from the unit found appropriate herein, there remains to be determined the status of forty-eight part-time faculty members in seven schools plus one University Professor.

The University's expressed purposes in hiring part-time faculty are generally to teach a particular course where student enrollment is larger than expected, or where a full-time member is ill or on leave, or to enrich certain programs with talent or expertise not possessed by full-time members, and the individual recruited is either not needed full-time or not available full-time. Part-time faculty are hired for a limited term of either one semester or one academic year. Compensation for part-time faculty is based primarily on the number of courses they are assigned to teach and experience or qualifications of the individual, whereas full-time faculty are paid an annual salary according to rank and numerous merit factors, although both are paid by check on a monthly basis. Although both some full-time and some part-time faculty work, in varying degrees, for either outside employers or as self-employed persons, as the University keeps no records regarding such figures, no distinction on the basis of percentage of total income derived from teaching is possible. As the University does not classify full-time faculty strictly according to numbers of courses, credit hours or contact hours taught, but includes other factors and variables such as committee involvement, research, and clinical work, upon which a relative judgment is made by the Department Chairman and approved by the Deans and Executive Office, no specific criteria may be developed to determine teaching involvement of part-time faculty as a class; or whether this is their primary

source of income. However, all faculty members are assigned a relative classification; as 1.0 for full-time and .75 for three-quarter time, and of approximately 1000 part-time faculty, of the 99 whom the University would include, 24 have been assigned the .75 classification, 9 of whom have voting rights and 15 of whom do not. The 24 classified in three-quarter status are eligible for one of two health insurance plans, major medical insurance and sick leave on a pro-rata basis, only a portion of the benefits for which full-time faculty are eligible. Those rated at less than three-quarter status are ineligible for any of the fringe benefits enjoyed by full-time faculty, except for a few social emoluments and privileges.

The University Faculty Senate is composed of all faculty members who have been granted voting rights. It regularly meets once each academic term and is empowered to consider matters affecting the academic and professional interests of two or more schools or colleges, and its function is primarily advisory, it being empowered to make recommendations to the President, the University Council and the several faculties. Attendance at the regular meetings of the Senate is usually about 10 per cent of faculty with voting rights. The right to vote is an accoutrement of the ranks of full, associate and assistant professors as a class, regardless of their full or part-time status. However, whether or not other part-timers have voting rights is dependent upon whether they have been extended such right by the school or college in which they hold appointments.

Voting rights are derived from the by-laws of the individual school or college. However, the by-laws vary from school to school giving an inconsistent overall result, both generally, to certain classes, and specifically, in the area of discretionary granting of such rights. The

general policy for extending voting rights to those not covered as a class, is based on whether or not the individual faculty members are viewed by their colleagues and the administration as important or critical to their school's instructional and research programs. Recommendations for granting voting rights are made, on an individual basis, by the Dean of the School and approved by the President. However, of the 16 schools and colleges, only five, Engineering, Public Communications, Social Work, Dentistry and Medicine have extended such voting rights. Although not sought to be included by the University in its definition of part-timers, it should be noted that in the School of Medicine, there are literally hundreds of faculty members with voting rights who derive no income from the University.

Full-time faculty are expected to engage in committee work within their respective schools and colleges, and the record indicates numerous examples of such involvement in every school, in some cases so extensive that certain members are granted reduced course loads so they may fulfill such demands.

The extent of commitment of a full-time faculty member to committee work is a factor considered in that member's evaluation for merit increases, re-appointment, promotion and tenure. Such extensive involvement of part-timers in committee work is generally neither required nor demonstrated, with a few notable exceptions as in the School for the Arts, where part-time participation in admission and performance committees is extensive, in the School of Social Work, where some part-timers are on sequence committees responsible for the design, updating and overseeing of particular programs, and some heavy commitments in the Medical School. However, as a general rule, part-timers do not participate in commit-

tees which decide such critical peer matters as appointment, promotion and tenure.

Although of the 99 part-timers the University seeks to include in the appropriate unit, 82 have been re-appointed in two to ten consecutive years, they are generally not eligible for tenure, with a few special exceptions, applied to unique situations. Their appointments, as those of all the part-timers, are renewable at the will of the University from semester to semester or from year to year, with no guarantee of continuance. As initial hiring of part-time faculty is generally done to accomplish a limited purpose for a limited time, initial evaluation and recruitment is neither as extensive or as vigorous as that required for full-time appointments.

Both full-time and part-time faculty are engaged, in varying degrees, in their basic function, teaching, and both prepare examinations, correct and grade papers, and advise and counsel students, although the part-timers' advisory role is usually limited to students in their specific courses. Only in limited clinical-type situations, where students are individually supervised is a part-time faculty member's recommendation for a degree of critical significance.

In its initial experience with the issue of the inclusion or exclusion of part-time faculty in the college or university context, the Board in *C.W. Post Center of Long Island University,* 189 NLRB 904, followed traditional industrial principles and included regular part-time faculty in a unit with full-time faculty. Within a month, in *University of New Haven, Inc.,* 190 NLRB 478, the Board reiterated this position, with the qualification that it would include, on facts similar in both cases, regular part-time faculty in units of full-time faculty, absent a stipulation of the parties to the contrary. As might be expected in

a developing area of law, problems arose in *Fordham University,* 193 NLRB 134, regarding the determination of which faculty members qualified as "regular". In this case, the Board permitted those whose regular status the parties could not agree upon, to be voted subject to challenge. In order to give more uniformity to the determination of who were and were not regular full-time faculty, in *University of Detroit,* 193 NLRB 566, the Board determined that, in the facts there presented, a test was required to insure that only those members who had a substantial and continuing interest in wages, hours, and other conditions of employment were included. It accordingly developed a formula under which those who taught 25 per cent of the average full-time course load would be considered to be regular full-time and, therefore, included in the unit. This formula was subsequently applied in *Manhattan College,* 195 NLRB 65, and *Tusculum College,* 198 NLRB 28, and part-time faculty were included in *Florida Southern College,* 196 NLRB 888, without reference to the formula.

A turning point on this issue was reached in *The Catholic University of America,* 201 NLRB 929, in which the Board initially applied the "one-fourth average teaching load of full-time counterparts" rule to the Law School faculty unit, acknowledging difficulties in its computation and application to this particular faculty group. Upon *sua sponte* reconsideration, in *The Catholic University of America,* 202 NLRB 727, the Board promulgated a more complex formula requiring that, for part-timers to be included in the unit, they must (1) be teaching one-quarter of the average teaching load, and (2) be actually teaching during the semester in which the election is held, or (3) if not teaching during the semester in which the election is held and, therefore, being ineligible to vote by reason of their not being on the current payroll, they would

be allowed to vote if they had taught pursuant to a written appointment in at least one semester during any two of the last three consecutive years, inclusive of that in which the election was directed, during which period their teaching load in each semester had been at least one-quarter of the average full-time load.

As a sequel, shortly after, the Board issued its now leading decision in *New York University, infra,* and based upon the reasoning enunciated therein, the Board abandoned its formula approach and concluded, in *Catholic University,* 205 NLRB No. 19, that part-time faculty do not share a community of interest with full-time faculty members and, therefore, should not be included in the same unit.

In *New York University,* 205 NLRB No. 16, in a majority decision, the Board, after resorting to its rare procedure, listening to and considering oral arguments in this case, *Catholic University,* 205 NLRB No. 19, and *Farleigh Dickinson University,* 205 NLRB No. 101, concluded, in language of broad application,

> "We are now convinced that the differences between the full-time and part-time faculty are so substantial in most colleges and universities that we should not adhere to the principle announced in the New Haven case."

It accordingly excluded all part-time faculty members.

In reaching this conclusion, the Board considered four major factors: (1) compensation, (2) participation in University governance, (3) tenure and (4) other conditions of work.

Subsequently in *Catholic University,* 205 NLRB No. 19; *Fairleigh Dickinson University,* 205 NLRB No. 101; *University of San Francisco,* 207 NLRB No. 15; *Point Park*

College, 209 NLRB No. 152; and *University of Miami,* 213 NLRB No. 64, the Board has consistently excluded all part-time faculty from units found appropriate therein, mostly without discussion.

In the present case, as set forth in detail above, the facts do not differ substantially from those considered by the Board in *New York University, supra.* Here, part-time faculty members are paid on a per-course basis unlike full-time members who are paid an annual salary. The record, although revealing average salaries for full-time faculty, does not indicate what amounts are paid to part-time faculty, so no determination can be made as to whether or not their compensation amounts to a "respectable honorarium". As the University does not keep, and hence could not produce records regarding sources of primary income, no conclusion is reached regarding this factor. However, no faculty member who is rated in less than three-quarter status is eligible for any of the fringe benefits available to full-time members, and only a very few, rated three-quarter status or more, are eligible for very limited benefits.

Although some part-time faculty have voting rights in the University Faculty Senate, in the circumstances of this case, this fact is not accorded great weight for the following reasons. The acquisition of such rights depends upon the by-laws of each school and are extended at the discretion of the dean and the administration. There appears to be no criteria consistently applied, in according the right to vote, to all part-time faculty uniformly. In some schools all part-time faculty have been extended voting rights whereas in others, none have these rights, and in the instance of the School of Medicine, several hundred part-time faculty have been extended these rights who are not on the payroll of the University. Part-time

faculty members' involvement in the governance of their individual schools, on the whole, is minimal, is the exception, rather than the rule, and there appears to be no involvement in the committees considering appointments, renewals, promotions and tenure.

Although the record discloses several instances in which tenure has been granted to part-time faculty members in exceptional circumstances, generally only full-time members are eligible. Part-time members are hired on a semester or academic year basis with renewal at the will of the University and even though a few have been re-appointed as often as ten times in consecutive years, they do not thereby become eligible for tenure. With few exceptions, part-time faculty activities are limited to teaching their courses, preparing and grading examinations and counseling students in their own courses, whereas full-time members, as indicated by their evaluations for promotion and tenure, are considered more favorably according to the extent of their involvement in research, publication, committee work and other criteria not applied generally to part-time faculty members.

Based upon the above and the record as a whole, it is concluded that the differences between full-time and part-time faculty are so substantial that part-time faculty do not share a sufficient community of interest with full-time faculty members to be included in the same unit with them. Accordingly, they are excluded from the unit found to be appropriate herein.

Directors of Academic Programs and Centers:

The parties agreed to exclude from the unit found to be appropriate the Directors of the Center for Law-Health Sciences, Boston City Hospital Medical Services, the Center for Criminal Justice, the Graduate Tax Program and Boston City Hospital Surgical Services. However, the University contends that the following are either super-

visory or managerial personnel and that they should be excluded, whereas the Petitioner contends they do not possess the necessary indicia, and should be included; the Directors of the African Studies Center; the Afro-American Studies Program; the Center for Latin-American Development Studies; the American and New England Studies Program; the Center for Applied Social Science; the Boston University Center for the Philosophy and History of Science; the Continuing Education Department in the School of Nursing;[20] and the University Professors Program.

Most of these centers and programs are operated by and within the framework of the Graduate School, which conducts courses leading to both Masters' and Doctors' degrees in areas which parallel and are integrated with those offered in the College of Liberal Arts. Although the Graduate School has its own dean, the chairmen of departments in the College of Liberal Arts perform the same function in the Graduate School which usually has no full-time faculty of its own.

The Graduate Council of the Graduate School has an elected executive committee which works closely with the deans on graduate programs. There have been developed the several centers and programs, enumerated above, each of which has a director who is recommended to the dean of the Graduate School by a selection committee composed of faculty members and department chairmen, associated with the centers, and who must be approved by the academic vice-president. The majority of full-time faculty members who teach in the centers and programs hold their base appointments in a department of the College of Liberal Arts and, although some are wholly paid through

[20] The Director of the Continuing Education Department in the School of Nursing is officially called a "coordinator" and her status is determined under the heading "Department Chairmen".

their departments, some are partly paid through the centers. The record indicates that all personnel actions regarding such full-time faculty members, in relation to their involvement with the centers, is done by directors jointly with the chairman of the department in which the member holds his base appointment, and in cases of conflicts in recommendations, they are resolved by the deans. As department chairmen have been found herein not to be supervisors or managerial personnel, such partial involvement of directors with personnel actions regarding full-time faculty members leaves the several directors in a more diluted position than chairmen.

All of the directors have faculty status and are engaged in teaching. As with department chairmen, some receive additional compensation, others do not, and most have regular faculty contracts. The University contends that directors play a significant role in hiring research associates. However, research associates do no teaching, are usually appointed for a single year, and are either unfunded by the University, working on individual grants, or are selected by a faculty member in the College of Liberal Arts who is the principal investigator for a grant out of which the research associate is paid. Regarding the directors' effectively recommending the hiring of visiting professors, who hold their base appointments at other universities, there is typically a search committee, comprised of faculty members in the area of the specialty of the visiting professor, which recommends the candidate to both the director and the chairman of the department within which this specialty falls. The dual recommendations then go to the respective deans for recommendation and forwarding to central administration.

Although directors have secretaries, and some have other support personnel under their direction, there is no

evidence indicating that any spend fifty-percent of their time in exercising supervisory functions over those non-unit personnel.

Because the activities of the centers are inextricably interwoven with the activities of the faculty of the College of Liberal Arts, scheduling of courses, symposia and colloquia must be arranged through the joint effort and consultation of the directors, department chairmen and faculty involved.

As the functions of directors parallel those of department chairmen, but are performed, for the most part, in collaboration with the chairmen, thereby exercising less independent judgment, and as chairmen have been excluded from the unit found appropriate herein, the directors are found to be neither supervisory nor managerial personnel, but rather, employees sharing a collegial community of interest with full-time faculty members. Accordingly, they are included in the unit. *New York University,* 205 NLRB No. 16.

Visiting Faculty:

The University would include and the Petitioner would exclude visiting faculty. The Faculty Manual [21] recognizes the temporary nature of appointments of full-time faculty members on leave from another educational institution, and the record discloses that such appointments are limited to a term of one academic year or less. Unlike regular full-time faculty, visiting faculty members are eligible only for one of two health insurance plans and for no other fringe benefits. They are not eligible for tenure, and some visiting faculty hold tenure at the institution from which they are on leave. Although some have voting privileges in the Faculty Senate, it is found

[21] V-2, 3.

that their work is essentially temporary in nature, they have no reasonable expectancy of re-appointment, and share no community of interest with regular full-time faculty. Accordingly, they are excluded from the unit. *Goddard College,* 216 NLRB No. 81.

The School of Law:

As noted above, Petitioner seeks a unit which excludes the faculty of the School of Law, whereas the University contends that the law school faculty should be appropriately included in a universitywide unit. The School of Law occupies approximately one half of the Law-Education Tower building on the Charles River Campus, which it shares with the School of Education. Each school, however, has its separate entrance, lobby, elevators and floors reserved for its exclusive use. The Law School occupies the second to ninth floors which contain all faculty offices, classrooms, and the student lounge. The specialized law library and auditorium are in an adjacent-connected building. Most recent figures indicate that a student enrollment of approximately 1400 are served by 36 full-time and 20 part-time members of the law faculty. Full-time faculty are hired only after several years of practice and, as a result of a combination of experience and competition from law firms and other law schools, enter at the rank of associate professor and are compensated at a level that is substantially above the average compensation of faculty members at all other schools on this campus. They receive or are eligible for the same fringe benefits as faculty in other schools. The average time for law faculty members to attain tenure is three years, whereas the faculty of other schools average six years before being eligible, and the percentage of tenured faculty on the law school staff exceeds that of most other schools in the University.

The School of Law is a charter member of the Association of American Law Schools and is approved by the American Bar Association through its Section of Legal Education and Admissions to the Bar. Such accreditations, requiring compliance with specific standards relating to curriculum, library resources and faculty, are critical to its serving the academic needs of students drawn from 177 colleges and universities in almost every state. Its program of mandatory first year subjects with second and third year electives provides a subject offering sufficiently flexible to accommodate the licensing prerequisites of almost any state. The necessity for accreditation, however, is not unique with the School of Law, as several other schools must also meet certain accreditation standards to insure that their graduates qualify for licensure or certification in their respective disciplines.

The School of Law maintains an academic calendar somewhat different from that used by other Schools on the Charles River Campus, established in accordance with principles and requirements set forth by accrediting agencies. As a result, it has separate dates for examinations and commencement exercises and conducts no summer term.

Appointments to faculty committees within the School of Law are made by the dean, similar to teaching assignments, and are considered a part of the faculty member's professional work, whereas, although some law school faculty members serve on a dozen or more universitywide committees, such service is voluntary and by request. The School of Law has its own registrar, Admissions Office, and maintains its records separately from those schools serviced by offices in Central Administration.

The School of Law is the most heavily endowed of all the schools on the Charles River Campus and is exceeded

only by the Schools of Medicine and Graduate Dentistry in the University. Unlike other schools on this campus, which share alumni contributions with the University, the law alumni maintain a separate charitable corporation which collects and holds funds which are used only for law school purposes.

The University emphasizes an integrated curriculum as a factor requiring inclusion of the School of Law in its proposed universitywide unit. However, a close examination reveals that only five students enrolled in the School of Law take courses outside the law school curriculum and 119 students enrolled at other schools take law courses, but of those, 112 take a general law course listed in the catalogue of the College of Liberal Arts. The University has had a six year combined program, leading to both a baccalaureate and a law degree in conjunction with the College of Liberal Arts. However, there is currently only one student registered in that program. The University further emphasizes law faculty participation in other programs. In 1973, there were three law faculty members engaged in teaching law-related courses during the summer term, and in 1974, there were four. Some of the law faculty also participated, in association with faculty members from the School of Medicine and other schools, in presenting seminars and instruction at the graduate level at the Center for Law and Health Services, and in the Center for Administration of Criminal Law sponsored by the law school, both of which are conducted away from the Law-Education Tower, but on the Charles River Campus.

In *Fordham University,* 193 NLRB 134 and *Syracuse University,* 204 NLRB No. 85 the Board held that a universitywide unit excluding the law school faculty was appropriate, and in *The Catholic University of America,*

201 NLRB No. 145 and *University of San Francisco*, 207 NLRB No. 15 it held that a separate unit of law school faculty was also appropriate. In the *University of Miami*, 213 NLRB No. 64, the Board, noting the similarity of determinative factors present throughout all of the cases treating this issue, held that an overall faculty unit excluding the law school and a separate unit limited to the law school faculty were both appropriate for purposes of collective bargaining. The facts in the instant case are not materially different from those in the earlier cases. Therefore, as the law school faculty constitutes an identifiable group of employees whose separate community of interest is not irrevocably submerged in the broader community of interest which they share with other faculty members, it is found that either a universitywide unit, as otherwise modified herein, including the faculty of the law school, or a unit limited to the faculty of the law school, would be an appropriate unit for purposes of collective bargaining. Moreover, as no labor organization is seeking to represent its faculty separately, the School of Law is excluded from the unit found to be appropriate herein.

The Schools of Medicine and Graduate Dentistry:

The Boston University Medical Center (the Center, herein) is located on the opposite side of the City of Boston, about a mile and a quarter distant from the Charles River Campus. The Center is a complex of some 14 buildings, one devoted to the School of Graduate Dentistry, three utilized by the School of Medicine, nine occupied by University Hospital, the principal teaching hospital, and one reserved for offices in which some faculty members conduct their private practices.

As the University By-laws indicate,[22] the Schools of Medicine and Graduate Dentistry are members of the Center under an agreement between the Trustees of Boston University and the Trustees of University Hospital, the terms of which provide for a semiautonomous management, with the deans of the two schools the administrator of the hospital and the director of the Center reporting to the Academic Vice-President for Health Affairs for the University (the latter two titles are currently held by the same person). A Center Trustee Council is impressed with the responsibility for all interests and operations of the Center, which operates with the advice of the Center Advisory Board and the Center Affiliate Board. Although the catalogues are in conflict, testimony indicates that the Schools of Nursing and Social Work and Sargent College of Allied Health Professions also come within the jurisdiction of the Academic Vice-President.

Contiguous to the Center complex is the Boston City Hospital; which, although not a member of the Center, is affiliated with it as a teaching facility as are some nineteen other hospitals or clinics within a fifty mile radius of Boston.

The Center agreement expresses an intent to merge the Medical and Dental schools into the Center and to decentralize, from the University to the Center, all business operations. In implementation of this intent a single budget for operation of the two schools and University Hospital is submitted to the Trustee Council and eventually to the University Trustees.

The University's fiscal responsibility to the Center is limited to $510,000 as support, the balance of the operating budget coming from a variety of government and foundation grants and research contracts and endowments. The

[22] Article VIII.

support guarantee is, in fact, recovered by the University, so that the Center is effectively, fiscally independent.

Generally, the Medical and Dental Schools follow established University wide policies, academically, and many of the faculty members of these two schools serve on University committees. Although the record indicates that the Medical School has 174 full-time and 35 part-time faculty the catalogue lists approximately 1300 members with faculty status. The Dental School catalogue lists over 200 faculty, of whom 4 are considered full-time and 14 part-time. There are 498 medical students and 312 dental students. The Director of the Center encountered some difficulty in explaining the large numbers with faculty status because of the admittedly complex individual arrangements with each. Relatively few are paid directly by the Center and have income from private practices, either directly or through pooling arrangements. Some faculty members have the same fringe benefits as full-time faculty in other schools of the University, but others have benefits from their base institution, and still others receive some benefits such as tuition remission for children, who are not paid directly or indirectly by or through either the Center or the University.

The University contends that there is considerable interchange of faculty between the Center and the Charles River Campus. However, there are no members of the faculty of the medical or dental schools on the faculty of the School of Nursing and the record indicates that clinical experience for nurses is acquired not only at Boston City Hospital, which is affiliated with the Center, but also at some twenty-seven hospitals and agencies in the greater Boston area, which are affiliated with the School of Nursing. Further, the dean of that school testified that clinical instruction is under direction of the faculty of the Nursing School.

The School of Social Work, although organizationally under the Academic Vice-President for Health Affairs, appears to have no Center faculty on its staff. Sargent College has approximately seven members of its faculty who hold joint appointments, with their base appointments at the Center, but it appears that arrangements for students' clinical experience are made on a limited and individual basis. The Graduate School, which is organizationally outside the jurisdiction of the Academic Vice-President for Health Affairs, lists a faculty of over 500, but almost all hold their base appointments at other schools, principally the College of Liberal Arts. Among 25 or more graduate programs, it offers one program covering six specialities, in the Field of Medical and Dental Sciences. There are approximately 80 faculty members who hold base appointments in the Medical and Dental Schools who participate in this program. Five or six medical school faculty members participate, along with faculty members from six or seven other disciplines in the Center for Law and Health Sciences. And there is a joint six-year program offered, leading to degrees both in Liberal Arts and Medicine. However, the first two years of this program are taken at the College of Liberal Arts and the last four follow the regular Medical program at the School of Medicine.

Aside from the large numbers of adjunct faculty, at the Center there are 178 full-time faculty members for 810 students, whereas at the Charles River Campus, there are 842 full-time faculty for in excess of 24,000 students. Although a very few faculty members of the schools related to health care on the Charles River Campus engage in some outside consultation or practice-equivalent, a proportionately larger number of faculty members at the Center engage in the practice of medicine and dentistry, many in

a separate building used solely for that purpose in the Center complex.

The Medical and Dental Schools generally operate on a twelve month academic calendar whereas the schools at the Charles River Campus generally follow the traditional semester arrangement with additional summer school, and of those whose compensation could be determined from the record, the faculty at the Center not only receive considerably higher compensation, but their methods and sources of compensation are quite different from those of faculty members at the Charles River Campus.

The Medical and Dental Schools are far more highly endowed and receive grants and research contracts far in excess of any of the other schools in the University, resulting in an extremely complex system of compensation at the Center.

As the Board has observed, in its first decision involving a medical school, in *University of Miami,* 213 NLRB No. 64, many of the factors which led it to conclude that law schools may appropriately be excluded from overall faculty units are equally applicable to other professional schools. Here, as in *Miami,* the Medical and Dental Schools are situated in a complex and community devoted solely to medical care and research and physically, particularly in its urban setting, remote from the Charles River Campus. These two schools are generally subject to universitywide policies and guidelines, have some faculty representation on universitywide committees and have an actual degree of faculty interchange with schools at the Charles River Campus that many reasonably be characterized as limited. However, unlike the schools at the Charles River Campus, these schools operate at least semiautonomously with an additional body of trustees and several advisory groups; they are separately budgeted, with

little real direct financial support from the University, with an extremely complex system of handling income, mostly from sources outside the University, and individualized methods of generally higher compensation. In view of the foregoing factors, the absence of any bargaining history, the limited amount of faculty interchange and the fact that no labor organization seeks to include either the medical or dental faculty in a broader unit, it is found that the faculties of the School of Medicine and the School of Graduate Dentistry do not share a community of interest with the faculty of the schools on the Charles River Campus, that is so interwoven as to render their exclusion from the unit found appropriate herein, inappropriate. Accordingly, the faculty of these two schools is excluded from the unit.

Accordingly, it is found that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time teaching members of the faculty at Boston University, including department and division chairmen, area chairmen in the School of Theology, sequence coordinators in the School of Social Work, coordinators in the School of Nursing, the director of the Teacher Training Project in Sarent College, the directors of the African Studies Center, the Afro-American Studies Program, the Center for Latin-American Development Studies, the American and New England Studies Program, the Center for Applied Social Science, the Boston University Center for the Philosophy and History of Science, the Continuing Education Department in the School of Nursing, the University Professors Program, faculty on leave[23] and

[23] As limited in the stipulations of the parties, *supra.*

in the Overseas Program,[23] but excluding all part-time faculty, all officers of the University, deans, associate deans, assistant deans, administrative support personnel, non-teaching professionals, librarians, graduate assistants, teaching fellows, student employees, non-professional employees, coaches,[23] directors of the schools of music, visual arts and theatre arts in the School for the Arts, visiting faculty, all faculty, department chairmen and program directors in the Schools of Law, Medicine and Graduate Dentistry, all other employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike, which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[24] Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by Boston University Chapter, American Association of University Professors.

/s/ Robert S. Fuchs

Robert S. Fuchs, Regional Director
Region One

Dated at Boston, Massachusetts
this 17th day of April, 1975.[25]

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[24] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236; *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such a list must be received in the Regional Office, Bulfinch Building, Seventh loor, 15 New Chardon Street, Boston, Massachusetts 02114, on or before April 24, 1975. Since the list is to be made available to all parties to the election, please furnish a total of two (2) copies. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

[25] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the Board in Washington, D. C. This request must be received by the Board in Washington by April 30, 1975.

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BT
RE TRUSTEES OF BOSTON UNIVERSITY, 1 RC 13564 EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION IS HEREBY DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW. BY DIRECTION OF THE BOARD: (MEMBER KENNEDY WOULD GRANT REVIEW WITH RESPECT TO THE INCLUSION OF DEPARTMENT CHAIRMEN IN THE UNIT AND PROCEEDING WITH ELECTION WITH DEPARTMENT CHAIRMEN IN UNIT. MEMBER PENELLO WOULD GRANT REVIEW WITH RESPECT TO THE EXCLUSION OF THE LAW, MEDICAL, AND DENTAL SCHOOL FACULTY FROM HTHE UNIT.)

CORR FIRST WORD IN NEXT TO LAST SENTENCE OF TEXT IS EXCLUSION
BT

Appendix D.

RELEVANT STATUTES.

United States Code, Title 29:

§ 152. Definitions

When used in this subchapter —

• • •

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

• • •

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

• • •

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

• • •

§ 159. Representatives and elections . . .

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the

exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

• • • •

§ 164. Supervisors as union members . . .

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

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Supreme Court of the United States.

October Term, 1978.

No. 78-67.

TRUSTEES OF BOSTON UNIVERSITY,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

Supplemental Brief to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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RESPONDENT.

Supplemental Brief to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The Petitioner, Trustees of Boston University, submits this supplemental brief in order to call to the attention of the Court the decision of the Court of Appeals for the Second Circuit in *NLRB v. Yeshiva University,* Dkt. 77-4182 (2d Cir. July 31, 1978). The *Yeshiva* case was decided after Boston University had filed its *Petition.* Boston University submits that the *Yeshiva* decision provides an additional reason why the Court should grant its *Petition* and also lends support to the reasons previously advanced by the University in its *Petition* filed on July 11, 1978.

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE SECOND CIRCUIT IN *NLRB v. Yeshiva University.*

In *NLRB v. Yeshiva University, supra,* the Second Circuit Court of Appeals refused to enforce an order of the National Labor Relations Board directing Yeshiva to bar-

gain with a union certified by the Board as bargaining agent for the faculty. The decision of the Second Circuit conflicts with the First Circuit's decision in *Trustees of Boston University v. NLRB*, 575 F. 2d 301 (1st Cir. 1978) (reproduced in *Appendix A* of the *Petition, supra,* pp. 35-55).

In its representation decision in *Yeshiva*,[1] the Board held, *inter alia,* that neither full-time faculty nor department chairmen or their concomitants were supervisory or managerial employees, and thus all such personnel were included in the bargaining unit. The Board included the faculty based on its conclusion that "faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than 'in the interest of the employer,' and final authority rests with the board of trustees." 221 NLRB at 1054 (footnotes omitted). The Board included the department chairmen in the unit based on the finding that the "chairman's authority has been effectively diffused among the department faculty pursuant to the principle of collegiality . . ." and that the chairmen "act primarily as instruments of the faculty . . . [and] . . . therefore stand largely on the same footing as the faculty, from whom they receive their authority." 221 NLRB at 1055, 1056. In support of this conclusion, the Board cited *inter alia, Fordham University*, 214 NLRB 971 (1974).

In its representation decision in the *Boston University* case, (*Decision and Direction of Election* reproduced in *Appendix* C of the *Petition* filed July 11, pp. 77-117), the Board concluded that the University's chairmen were not supervisors for precisely the same reasons relied upon to

[1] *Yeshiva University and Yeshiva University Faculty Association*, 221 NLRB 1053 (1975).

include both faculty and chairmen in *Yeshiva.*[2] The Board found that the record revealed the authority exercised by the chairmen "indicate[d] collective rather than authoritarian action, most of which is not only reviewable on the higher administrative levels, but which in significant numbers of cases has been shown to be ineffective . . . ." Nor were the chairmen considered to be managerial since "their interests are more akin to those of the regular faculty than to those of the administration." (*Petition, Appendix C, supra,* pp. 94, 95). In support of this conclusion, the Board cited *Fordham University*, 214 NLRB 971.

Thus the Board determinations in *Yeshiva* and *Boston University* rested upon identical doctrines and identical precedent. What is important to this petition is the differing conclusions of the First and Second Circuits as to the validity of those Board doctrines.

The First Circuit deferred to the Board's conclusion and emphasized the role of the faculty in shaping the de-

[2] Boston University also argued before the Board that its faculty were managerial employees and thus excluded from coverage under the Act. See Point III A of Boston University's *Response to Notice to Show Cause* submitted to the National Labor Relations Board on November 29, 1976 and reproduced in the *Joint Appendix* at pp. 122-124 filed with the First Circuit Court of Appeals. The Board, in its *Decision and Order*, 228 NLRB No. 120 (reproduced in *Appendix B* of the *Petition, supra,* pp. 57-75) refused to consider the University's contention as it claimed that the argument was not raised in the initial representation proceeding (at p. 67 n. 7). While the University considered the Board's failure to rule on its claim to be improper, an appeal on this issue was not pressed to the Court of Appeals. The managerial status of the University's faculty was somewhat academic because if the University prevailed in its argument that its chairmen were supervisors or managerial employees, which argument must be at least as strong, *a fortiori,* as such argument regarding the faculty, then the Board's certification would have been set aside. The status of the faculty could be relitigated in any subsequent representation proceeding.

cisions and recommendations of the chairmen. The Court stressed that "the department chairperson's recommendation [regarding hiring of new faculty], as is the case in other universities, is the result of [faculty] consultation." *Petition, supra,* p. 43. The Court found that the selection process for choosing a chairman "is usually based on a consensus of the faculty of the department" and that the chairmen "represent the interests of the tenured professors of the department rather than the University." *Petition, supra,* p. 44. The Court concluded that the Board was entitled to find that the chairmen were "acting 'in the interest' of the faculty, not of the employer." *Petition, supra,* p. 43.

In contrast to the deference afforded the Board by the First Circuit, the Second Circuit took issue with all three of the legal doctrines which the Board had relied on to include the faculty and chairmen in the Yeshiva bargaining unit and the chairmen in the Boston University unit. The Second Circuit analyzed and rejected each basis upon which the Board rested its decision. The Court held that just because authority is exercised "on a collective basis," does not mean that those who possess such authority should be denied managerial status. *NLRB v. Yeshiva University, supra,* slip op. at 20-23, 28.[3]

Similarly, unlike the First Circuit, the Second Circuit found the Board's ultimate authority argument (*i.e.* "the

[3] While the Second Circuit found it unnecessary to decide whether the fact that authority is exercised in a collegial manner precludes the participating individuals from being considered supervisors, the Court strongly indicated that collective authority was not inconsistent with supervisory status. *NLRB v. Yeshiva University, supra,* slip op. at 20-22. Even if this Court were unable to reconcile supervisory status with "collective authority" when applying such concepts to faculty, Boston University submits that its chairmen clearly possess independent indicia of supervisory status. See *Petition, supra,* pp. 20-33.

concept that the faculty has neither managerial nor supervisory status because it is subject to the ultimate authority of the Board of Trustees") to be "particularly unconvincing." *NLRB v. Yeshiva University supra,* slip op. at 26.[4]

Finally, the Second Circuit also rejected the Board's attempt to deprive faculty of managerial status based on the distinction that the authority of the faculty is exercised "in the interest of the faculty rather than the employer." The Court commented that "the Board's attempt to dichotomize those interests results in a strained, artificial separation." *NLRB v. Yeshiva University, supra,* slip op. at 26. While the Board's attempt to force the industrial "we — they" model on institutions of higher education seems to have been adopted by the First Circuit, *Petition, supra,* pp. 43-44, the Second Circuit has found that such a distinction cannot withstand critical analysis.

Thus the three doctrines which were the basis of the Board's unit determinations in *Boston University and Yeshiva* were accepted, largely without discussion, by the First Circuit, but were rejected, after a rather lengthy analysis, by the Second Circuit. While the two cases may have some factual distinctions, Boston University submits that the conclusions drawn from the facts and the legal doctrines employed by the Board to reach an identical result in *Yeshiva* and *Boston University* are themselves identical. The decisions of the First and Second Circuits thus present a true conflict on an obviously important issue; an issue which must be resolved by this Court if the

[4] In discussing the applicability of this theory to § 2(11) of the National Labor Relations Act which defines the term "supervisor", the Court commented that "[o]bviously . . . the section contemplates a review by some higher authority." *NLRB v. Yeshiva University, supra,* slip op. at 26.

National Labor Relations Act is to be applied to higher education in a consistent and coherent manner.[5]

Conclusion.

For the additional reason that there exists a conflict between the circuit courts, it is respectfully submitted that Boston University's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[5] Nor is the conflict between the two circuits diminished by the fact that the issue presented to the First Circuit was the supervisory or managerial status of department chairmen while the issue before the Second Circuit was the status of both faculty and chairmen. For in order to find that Boston University's chairmen were not supervisors or managerial employees, the Board first had to lump the chairmen with the departmental faculty as representatives of their interests. *Trustees of Boston University v. NLRB*, reproduced in *Petition, supra*, at 44. Thus if faculty are managerial or supervisory, then department chairmen, who according to the Board "are on the same footing as faculty", *Yeshiva University, supra*, 221 NLRB at 1056, must also be supervisors or managers.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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SECOND SUPPLEMENTAL BRIEF OF THE TRUSTEES OF BOSTON UNIVERSITY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1978

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---

SECOND SUPPLEMENTAL BRIEF OF THE TRUSTEES OF BOSTON UNIVERSITY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

This Second Supplemental Brief is filed in response to the Supplemental Memorandum filed by the Union on February 27, 1980. It is the position of the Trustees of Boston University ("Boston University") that the instant petition is clearly meritorious in view of the Court's decision of February 20 in *N.L.R.B.* v. *Yeshiva University*, 48 LW 4175, and

that, at the very least, this case should be remanded to the First Circuit for further proceedings consistent with the Court's *Yeshiva* decision.

I.

Contrary to the Union's assertion, the Court's *Yeshiva* decision does not require denial of Boston University's petition for a writ of *certiorari*. Rather, that decision clearly compels the opposite result. As *Yeshiva* found that faculty members are managerial employees excluded from the coverage of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, *et seq.* ("the Act"), then, *a fortiori*, the department chairmen at Boston University must be excluded from coverage of the Act as managerial employees. It follows, moreover, that the Board's inclusion of the department chairman in the unit found appropriate at Boston University not only taints the overall appropriateness of such unit, but raises serious numerical questions with respect to the underlying election which was won by the Union.

At all material stages of this case, Boston University has contended, and still contends, that its department chairmen should be excluded as managerial employees. The Court of Appeals, however, agreeing with the Board rejected this contention, stating, *inter alia*, that "the Board was entitled to find that [the chairmen were acting] . . . 'in the interest' of the faculty, not the employer." *Trustees of Boston University* v. *N.L.R.B.*, 575 F.2d 301, 306 (1st Cir. 1978). In light of this Court's decision in *Yeshiva* specifically rejecting this approach (42 LW at 4179), we submit that the First Circuit's decision is not tenable.

The Union itself, moreover, recognized the inconsistency between the First Circuit's *Boston University* decision and the Second Circuit's (and now this Court's) rationale in the *Yeshiva* case. Thus, at pp. 2-3 of its Supplement to Brief filed in this very case in January, 1979—a time when petitions for *certiorari* were pending in both *Boston University* and *Yeshiva*—the Union contended that the instant petition should be granted and stated:

> If the petition in *Yeshiva* is denied, or if it is granted and that decision is affirmed, an anomalous situation would result if the petition in this case is denied. Although the bargaining order in this case [*Boston University*] would impose on Boston University a continuing obligation, enforceable by contempt proceedings in the court of appeals, at Yeshiva and at other similar universities, especially those in the Second Circuit, no such obligation would be enforced. Moreover, in this event, it would remain open to Boston University to argue, in a variety of subsequent Board proceedings, that its faculty are managerial or supervisory employees, thereby very possibly defeating its obligation to bargain.

Furthermore, the decisions of the two courts of appeals are closely related and at least arguably in conflict. . . . The Board included the chairmen [in *Boston University*] on the theory that, in making recommendations on matters of academic governance, they acted primarily in the interest of the faculty. *But obviously if the faculty's collective role in governance matters deprives them of employee status, then the chairmen's role in these matters, even if exercised in the interest of the faculty, renders them super-*

visory or managerial employees. (Emphasis added.)

We submit that the force of the Union's argument has not diminished. Since that time, the Court has, of course, granted the petition for a writ of *certiorari* in *Yeshiva* and affirmed the Second Circuit's decision. This Court's decision carries with it an implicit rejection of the First Circuit's decision in the instant case.

It is no less true today that denial of the instant petition would countenance the anomalous result of this Court's exclusion in *Yeshiva* of faculty members as managerial employees, but the inclusion here of department chairmen—faculty members who certainly have managerial and supervisory responsibilities in addition to those of normal faculty members.

II.

It is true, as the Union asserts, that since the First Circuit enforced the Board's bargaining order, the Union and Boston University executed a collective bargaining agreement, one of the terms of which recites that the agreement shall remain effective until August 31, 1981. But it is not accurate to insinuate, as the Union also does, that the existence of the collective bargaining agreement has rendered "moot" both the Board's bargaining order and this pending judicial proceeding. On the contrary, the bargaining agreement itself, as well as material events which preceded its execution, demonstrate that the issues pressed in the instant petition have not been resolved by the parties and that the continued existence of the executed agreement has been expressly made to depend on the outcome of this case.

Thus, a Memorandum of Settlement in the form of an addendum to the agreement, which was signed by the parties on April 13, 1979, and which brought the basic bargaining agreement into being, expressly provides, *inter alia* [1]:

* * * *

> 5. It is understood that the collective bargaining Agreement is subject to the final disposition of First Circuit Cases Numbers 77-1143, 77-1365, and 77-1226, now pending in the Supreme Court of the United States upon a petition of certiorari (No. 78-67). However, it is agreed that, by the execution of this settlement Agreement, neither party waives any of its rights with respect thereto; and it is further agreed that the foregoing does not prejudice the Chapter's right to claim that this agreement remains in effect for its duration.

Nor is it happenstance that the quoted provision of the Memorandum of Settlement is an integral part of the parties' agreement. Thus, the Union has not in its Supplemental Memorandum fully apprised the Court of the circumstances which led to the inclusion of the provision in the agreement.

What in fact happened was this. The terms of a draft agreement were negotiated by representatives of the Union and Boston University's Trustees. When completed, the draft agreement was submitted to the Trustees. The Trustees refused to approve the draft because, among other reasons, the draft language

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[1] The full text of the Memorandum of Settlement is quoted at page 2a of the Union's Supplemental Memorandum. However, only a passing reference—cryptic at best—is made by the Union to the language quoted in the text. See Union's Memorandum, note 4.

neither mentioned the instant then pending petition for a writ of *certiorari* nor subordinated the agreement's continued existence to the petition's outcome. Because of the Trustees' refusal to sign the draft agreement, there was a faculty strike supported by the Union. Thereupon, there were further negotiations in the presence of a federal mediator between the representatives of the Trustees and the Union. The latter negotiations ultimately brought about a final agreement between the parties and the end of the strike. The final agreement between the parties —which is the agreement the Union now cites to the Court—contains, at the insistence of the Trustees, various important modifications of the substantive terms of the earlier draft agreement. The final agreement also includes the Memorandum of Settlement which, again at the express insistence of the Trustees, contains the above-quoted provision expressly referring to this pending judicial proceeding.

We therefore submit, in view of the express language of the Memorandum of Settlement, as well as the circumstances leading to its execution, that it is utterly absurd for the Union now to contend that the parties' collective bargaining agreement moots the instant petition.

Respectfully submitted,

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DATED: February 28, 1980

No. 78-67

In the Supreme Court of the United States

OCTOBER TERM, 1978

TRUSTEES OF BOSTON UNIVERSITY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35-55) is reported at 575 F. 2d 301. The decision and order of the National Labor Relations Board (Pet. App. 57-75) are reported at 228 N.L.R.B. 1008.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1978. The petition for a writ of cer-

tiorari was filed on July 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board reasonably exercised its discretion to define appropriate bargaining units by excluding the law, medical and dental faculties from a unit of faculty members at the University.

2. Whether there was substantial evidence to support the Board's finding that the University's department chairmen were "employees" and not "supervisors" within the meaning of the National Labor Relations Act.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151, *et seq.*, are set forth at Pet. App. 119-120.

STATEMENT

1. Boston University is a private, non-profit educational institution governed by a board of trustees.[1]

[1] An executive committee of the board of trustees determines wages and other compensation for all University personnel, reviews the budget prepared by the President, recommends the budget to the trustees, and approves expenditure requests supplemental to the approved budget (Pet. App. 82; Er. Exh. 1 (p. 580), 140). "Tr." references are to the transcript of the Board's bargaining unit hearing; "Bd. Exh.," "Pet. Exh." and "Er. Exh." refer to the exhibits introduced at that hearing by the Board, the Union and the University.

Management of University affairs is delegated by the trustees to the president, his assistant and vice-presidents, and the deans responsible for each school or college (Pet. App. 82-83). Each dean prepares his school's budget, supervises its curriculum, maintains its academic standards, and recommends to the president and the board of trustees the hiring, promotion, and tenure of faculty within the school (Pet. App. 83, 90, 91).

Several of the schools are divided into departments. The dean appoints department chairmen, usually from among department faculty members. The University's *Faculty Manual* requires the dean to consult with the tenured full professors of the department before appointing a chairman (Pet. App. 85). While holding their position, chairmen continue to serve as faculty members (Pet. App. 86, 94); they teach (Tr. 2461, 2666-2667), conduct research and write (Tr. 1331, 2294-2295, 2666), participate in committee work (Tr. 2112-2114, 3054), and advise students (Tr. 1148, 2667, 2925). They have standard 9-month faculty contracts, unlike the 12-month contracts held by administrators (Tr. 2320, Pet. Exh. 43 (p. XI-1)), and participate in the same fringe benefits as other faculty members (Tr. 1915-1917). Chairmen are listed in the various school catalogs as faculty rather than administrators (Pet. App. 94). Although department chairmen receive a stipend in addition to their salaries, they do not necessarily hold the highest academic rank nor do all have tenure (Pet. App. 94; Tr. 987, 1243-1244, 2459,

2935). Department chairmen enjoy a reduced teaching load, as do faculty members participating in committee and other academic work (Pet. App. 94; Tr. 714, 1990, 2074, 2160-2162). A few department chairmen have accepted administrative posts, but the vast majority have returned to regular faculty status following their terms (Pet. App. 94).

The appointment of full-time faculty members is by approval of the trustees upon written recommendation of the president, the academic vice-president and the dean concerned (Pet. App. 87; Er. Exh. 140, art. IV, § 5). The *Faculty Manual* provides that the department chairman may recommend appointments " 'but only after consultation by him with all full professors with tenure of that Department' " (Pet. App. 87).[2] The *Faculty Manual* also requires the department chairman to consult with a committee of all tenured department members in recommending to the dean the reappointment of non-tenured faculty (Pet. App. 89; Er. Exh. 133 (p. 3); Pet. Exh. 436 (p. III-5)). Similarly, faculty consultation is required for

[2] In all but the most exceptional circumstances chairmen will not recommend a candidate for full-time appointment in the absence of faculty approval (Tr. 1131, 2052, 2100, 2175, 2298-2299, 2411-2413, 2569-2570, 2597-2598, 2671-2672, 2943, 3055-3058). Moreover, chairmen do not have the power to veto a faculty recommendation (Tr. 2296, 2447; Pet. Exh. 21, 28). Part-time faculty members are hired upon approval of the dean after recommendation by the department chairman. Generally, chairmen consult with faculty members prior to making such a recommendation, although they act with somewhat broader discretion in recommending part-time teachers (Pet. App. 88).

tenure and promotion recommendations (Pet. App. 89).[3]

Department chairmen do not effectively recommend discipline of either tenured or untenured faculty (Pet. App. 90-91). Nor do they direct faculty in the performance of their academic duties. The responsibility for academic matters rests with the faculty (Pet. App. 92). The chairman or other faculty member compiling course schedules solicits each faculty member's course and time preferences before determining these matters (Pet. App. 92).

Department chairmen have only a limited role in recommending annual salary adjustments. The adjustments are generally made within guidelines established by the dean, the administration, or by the faculty (Pet. App. 91). Nor does the chairman play an independent role in either formulating or administering the budget (Pet. App. 91). Administration of the department budget is largely ministerial; the chairman must generally obtain prior approval from the dean before exceeding any line item or transfering funds between lines (Pet. App. 91-92).

Chairmen do not significantly supervise departmental support personnel or other assistants. Even in departments with large numbers of secretaries

[3] Every school has either a departmental or school-wide promotion and tenure committee which makes an independent recommendation (Pet. App. 90). Several departmental recommendations have been rejected by either a school-wide faculty committee or the dean (Tr. 964-966, 1017-1020, 1130, 2107, 2182, 2539-2541) or by the president or the president's tenure committee (Tr. 1314, 1352, 2110, 2455-2456).

and technicians the chairmen spend 5-10 percent of their time supervising support staff (Pet. App. 95, 44 n.4). The chairman's supervisory authority is limited by university personnel policies (Tr. 1096-1097) and evaluation of support personnel is usually discussed with faculty members or delegated to administrative assistants (Tr. 1215-1217, 2008-2010, 2510, 3069-3070). Graduate research assistants, teaching assistants, and teaching fellows are selected by individual faculty members or by a faculty committee, not by the chairmen (Tr. 1137, 2771, 2817).

2. The University consists of sixteen schools and colleges, fourteen of which, including the law school, are located on the University's main campus (Pet. App. 79). The law school is a separate facility both physically and administratively. The school occupies a separate block of eight floors in a building on the main campus and has a separate entrance, lobby, and elevators (Pet. App. 107). The school has a separate admissions office and registrar, maintains its own records (Pet. App. 108) and makes independent recommendations for financial aid (Tr. 2638-2642). It also has an academic calendar different from the rest of the university (Pet. App. 108). The law school has significant financial resources; its endowment is exceeded only by that of the Schools of Medicine and Graduate Dentistry (Pet. App. 108-109). The law school has formed a separate alumni organization that solicits funds solely for the use of the law school. Unlike the other schools on the main campus, the law school does not divide its contributions with

the rest of the University (Pet. App. 109). Due, in part, to the law school's generous endowment, the average salary of law school faculty members during the 1974-1975 academic year was $27,000, while the average faculty salary was $17,000 (Tr. 141-144; Pet. Exh. 1, 44). Unlike faculty members in other schools, law school faculty members are generally hired after several years of practice and begin work as associate (rather than assistant) professors. They generally receive tenure in three years while faculty members at the other schools generally receive tenure in six years (Pet. App. 107).

The medical and dental schools are located in another part of the City of Boston more than one mile away from the main campus (Pet. App. 79). The medical and dental schools and the university hospital are consolidated into the Boston University Medical Center and are administered by a Center Trustee Council (Pet. App. 110-111). Decision-making and the general operation of support services including accounting, personnel, purchasing, disbursement and building are decentralized from the University, and are merged in the Medical Center (Pet. Exh. 42, art. VIII, §§ 5-6). The Medical Center engages independently in the solicitation and administration of grants (*id.*, art. VIII, § 7). The medical and dental schools maintain their own records and determine their own admissions policies (Tr. 2626, 2646). The Medical Center and the two affiliated schools are financially independent of the University (Pet. App. 111-112; Pet. Exh. 42, art.

VIII, § 1; Tr. 1930-1931). The medical and dental schools have far larger endowments than the other schools in the University, and receive more money from grants and research contracts than the other schools (Pet. App. 114). Like the law school, but unlike the other schools in the University, the medical and dental schools do not share the contributions they receive with the rest of the University (Tr. 2381). A majority of the members of the medical school faculty receive more than 50 percent of their salary from sources other than the University, unlike the faculty members in other schools (Pet. App. 112; Tr. 1528-1529, 1933-1940, 1954; Er. Exh. 144). Likewise, at the dental school, of 200 listed faculty members, only 4 are considered full-time teachers, and nearly all receive most of their income from outside sources (Pet. App. 112). Including income from outside sources, the faculty at the medical and dental schools earn substantially more than the faculty at the rest of the University (Tr. 2720). Because most faculty members engage in private medical and dental practice, teaching schedules are specially arranged between the individual faculty member and the dean (Tr. 1964, 1930, 1951-1952).

3. In October 1974, the Union[4] filed a petition requesting an election among the University's full-time teaching faculty including department chairmen but excluding the faculties of the law, medical

[4] Boston University Chapter, American Association of University Professors.

and dental schools (Pet. App. 37). Following an extensive hearing, the Board's Regional Director rejected the University's contentions that the department chairmen were "supervisors" rather than "employees" and that the faculty of the three professional schools should be included in the unit. The Regional Director found that department chairmen neither directly supervised other faculty members nor made independent effective recommendations regarding their employment. The Director further found that the minimal supervision exercised by chairmen over non-faculty personnel such as secretaries and research assistants was insufficient to render them supervisors within the meaning of the Act. (Pet. App. 94-95.) The Director excluded the faculties of the three professional schools because those schools were largely autonomous; because they had separate facilities and financing; and because the economic interests of their faculties were distinct from those of the other University faculties due to their substantial outside employment and significantly higher salaries (Pet. App. 107-115).

The Board denied the University's request for review (Pet. App. 118). The Union won the ensuing representation election and was ultimately certified as the exclusive bargaining representative (Pet. App. 60-62). When the University refused to bargain with the Union, the Board, on summary judgment, found it in violation of Section 8(a)(5) and (1) of the Act and ordered the University to bargain with the Union (Pet. App. 57-75).

4. The court of appeals affirmed the Board's findings and enforced its order (Pet. App. 35-55).

Concerning the asserted supervisory or managerial status of department chairmen, the court noted that this question depends on "the degree of control exercised by chairpersons over other bargaining unit personnel and the relative amount of interest they have in furthering the policy of the administration as opposed to the members of the bargaining unit" (Pet. App. 42). The court found substantial evidence to support the Board's findings that the chairmen did not exercise control over the faculty and that the recommendations of department chairmen were the "result of * * * consultation [with the faculty]" and were made " 'in the interest' of the faculty, not of the employer" (Pet. App. 43). The court emphasized that "the selection process for department chairpersons is such that they represent the interests of the tenured professors of the department rather than the University" (Pet. App. 44). With regard to supervision of non-unit personnel, the court noted that "the time spent in [these] supervisory duties 'reached a maximum of five to ten percent among the many chairmen who testified' " (Pet. App. 44 n.4).

The court also held that the Board's exclusion of the three professional schools was not "arbitrary" and rested "on substantial evidence" (Pet. App. 45-48). It agreed with the Board that there are "significant differences between [these schools] and the other graduate schools included in the bargaining unit" (Pet. App. 46).

ARGUMENT

The Board's determinations, affirmed by the court of appeals, that the faculties of the law, medical and dental schools should be excluded from the bargaining unit and that the department chairmen should be included, depend on the facts of this particular case and constitute a reasonable exercise of the Board's discretion in determining representation matters. Further review of the essentially factual determinations of the Board is not warranted.

1. Section 9(b) of the Act directs the Board in each case to define the appropriate unit for collective bargaining "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act." As this Court observed in *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491 (1947), the determination is a factual one, "involv[ing] of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed." Accord, *South Prairie Construction Co.* v. *Local 627, Operating Engineers*, 425 U.S. 800, 805 (1976). As the court of appeals noted, the burden is on the party opposing the Board's determination to show that the unit selected is "clearly not appropriate" (Pet. App. 45, citing *Banco Credito* v. *National Labor Relations Board*, 390 F. 2d 110, 112 (1st Cir.), cert. denied, 393 U.S. 832 (1968)). For in making unit determinations, "[t]he Board often must choose among several alternative units, each of which may

have rational foundations." *Local 1325, Retail Clerks International Association* v. *National Labor Relations Board*, 414 F. 2d 1194, 1198-1199 (D.C. Cir. 1969). The Act does not require that the unit designated by the Board be the "most" appropriate unit; "the existence of alternative units which are 'appropriate' will not alone warrant reversal if the Board has chosen some other unit which is also appropriate" (*id.* at 1202).

2. Petitioner's argument that the faculties of the medical, dental and law schools were improperly excluded from the bargaining unit is based largely on its assertion (Pet. 13) that the "faculty at these three Schools share with their colleagues elsewhere at the University a far greater similarity than dissimilarity of employment conditions and concerns." [5] Petitioner's argument merely quarrels with the Board's contrary factual finding, which the court

[5] Petitioner points out (Pet. 17) that the Board has previously included a dental school in a university-wide unit (*Fairleigh Dickinson University*, 205 N.L.R.B. 673 (1973)) and urges, on that basis, that the Board's decisions are "inconsistent" (Pet. 17 n.7). However, as noted above, unit determinations turn on their particular facts. In *Fairleigh Dickinson*, unlike the present case, the dental school was not under the operation of a separate medical center and university-wide policies of tenure and promotion were applicable. See also, *University of Miami*, 213 N.L.R.B. 634 (1974); *Syracuse University*, 204 N.L.R.B. 641 (1973), and *Fordham University*, 193 N.L.R.B. 134 (1971), where medical and law schools were excluded from overall faculty units.

of appeals affirmed, and raises no issue for this Court.[6]

In any event, the Board's findings are amply supported by the record. As noted above, the medical and dental schools occupy a separate campus, have separate facilities, and are part of a separate organization—the University Medical Center. Although located on the main campus, the law school also maintains essentially separate facilities. All three schools have significant independent resources. As the court of appeals noted, these elements are important "in determining what the faculties of the respective schools can realistically expect from collective bargaining" (Pet. App. 47). In addition, these professional faculties are economically distinct from other University faculties due to their substantial outside employment and far higher salaries.

There is no merit to petitioner's further contention (Pet. 17-20) that the Board's exclusions interfere with the existing system whereby the entire faculty participates significantly in governing the University as a whole. Designating a collective bargaining agent to represent an economically distinct group of faculty

[6] See, *e.g.*, *Beth Israel Hospital* v. *National Labor Relations Board*, No. 77-152 (June 22, 1978), slip op. 23: " 'Whether on the record as a whole there is substantial evidence to support agency findings is a question Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.' "

members does not deprive other groups of their traditional ability to participate in university affairs. Moreover, the only university-wide governance body, the University Senate, considers only academic and professional—not budgetary or administrative—matters affecting more than one school, and can only recommend, not institute, action. The certification of a bargaining representative will not affect the operation of that body (Pet. App. 97).

3. As the court of appeals pointed out (Pet. App. 42), supervisory or managerial status turns on "the degree of control exercised * * * over other bargaining unit personnel"[7] and whether the employees in question serve as representatives of management or of other bargaining unit members. Petitioner argues that department chairmen possess a large degree of such control and function as management representatives. The Board, upheld by the court of appeals, found otherwise. This factual issue does not warrant further review in this Court. "The Board's findings are 'entitled to the greatest deference in recognition of its special competence in dealing with labor problems.'" *American Broadcasting Companies, Inc.*

[7] Section 2(11) of the Act defines a "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

v. *Writers Guild of America*, No. 76-1121 (June 21, 1978), slip op. 21. The court of appeals properly concluded that substantial evidence supported the finding that department chairmen do not exercise significant authority over other faculty members, and that they do not serve as representatives of the University as opposed to other members of the bargaining unit.[8] Instead, the department chairmen

[8] Petitioner argues (Pet. 21-22 and n.15) that the Board's decision here and in *Fordham University*, 214 N.L.R.B. 971 (1974), cannot be distinguished from cases in which the Board has found department chairmen to be supervisors. But as the Board pointed out in this case, "'we are not persuaded, on the basis of our experience to date with university cases in which their supervisory status is in issue, that faculty department heads *generally* have or exercise supervisory authority * * * [a]nd we see no reason at this time to depart from our usual practice of requiring an affirmative showing that the disputed faculty department heads have been given one or more of the indicia of supervisory authority set forth in Section 2(11) [of the Act] * * *'" (Pet. App. 85).

In other contexts, of course, the Board has found department chairmen to possess supervisory authority. Thus, in *C. W. Post Center*, 189 N.L.R.B. 904, 906 (1971), and *Long Island University (Brooklyn Center)*, 189 N.L.R.B. 909 (1971), the Board found that the chairmen "exercise the authority to make effective recommendations as to the hiring and change of status of faculty members." In *Adelphi University*, 195 N.L.R.B. 639, 642 (1972), the chairmen allocated merit raises in their departments. In *Syracuse University*, 204 N.L.R.B. 641, 642 (1973), in addition to exercising control over departmental assignments and "monetary benefits," the chairmen "serve in * * * permanent status * * * some do no teaching at all, and * * * there is a definite line of progression from department chairman into college and university executive positions." And in *Fairleigh Dickinson University*, 205 N.L.R.B. 673, 675 (1973), the Board found that the chairmen "have

were shown to share a community of interest with their fellow faculty members, stemming from the long tradition of collegial responsibility and decision-making in the university (Pet. App. 85-93).[9]

Nor is there merit to petitioner's contention (Pet. 26-33) that the chairmen should be excluded from the unit because of their supervision of non-unit employees. The Board has repeatedly held that employees who incidentally supervise non-unit personnel and are not otherwise allied with management should not be considered supervisors under the Act. *Adelphia University*, 195 N.L.R.B. 639, 644 (1972); *University of Chicago*, 205 N.L.R.B. 220, 223 (1973), enforced, 506 F.2d 1402 (7th Cir. 1974); *Westinghouse Electric Corp.*, 163 N.L.R.B. 723, 727 (1967), enforced, 424 F.2d 1151 (7th Cir.), cert. denied, 400 U.S. 831 (1970). The Board's rule strikes an appropriate balance between the explicit right of professional employees under the Act to employee

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substantial responsibility for the hiring of new faculty members and the retention of faculty members who have not yet attained tenure."

[9] Contrary to petitioner's argument, the Board's decision does not "pervert 'collegiality'" (Pet. 25) or require the University to "change its basic system of administration" (Pet. 26). Rather, the Board's decision to include chairmen in the bargaining unit is based on the actual practice of the University and the fact that chairmen and faculty make decisions on a collegial basis. Under these circumstances, to exclude the chairmen and thus separate them from their fellow faculty members would not comport with current university practices and would unjustifiably deprive the chairmen of their rights under the Act.

status (Section 2(12) of the Act) and the interest of management in the loyalty of truly supervisory personnel.[10] To hold otherwise would substantially curtail the right to representation of professional employees who customarily direct secretarial, technical and other support personnel as a necessary but incidental part of their job. See *Westinghouse Electric Corp.* v. *National Labor Relations Board*, 424 F.2d 1151, 1156-1158 (7th Cir. 1970), cert. denied, 400 U.S. 831 (1970). The court of appeals properly approved the application of the Board's rule here, noting that the chairmen spend at most only 5 to 10 percent of their time in such duties.[11]

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[10] While petitioner argues for a different interpretation of the Act, "'[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.'" *National Labor Relations Board* v. *International Association of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 350.

[11] In its supplemental brief, petitioner contends that the decision of the Second Circuit in *National Labor Relations Board* v. *Yeshiva University* (No. 77-4182, July 31, 1978), 98 L.R.R.M. 3245, is in conflict with the instant case. There is no merit to that contention. In *Yeshiva*, the Second Circuit held that the entire full-time faculty of the university were supervisory or managerial employees. No such issue was raised here; indeed petitioner conceded throughout the instant proceeding that its full-time faculty constituted an appropriate bargaining unit, but contended that department chairmen should be excluded based on their alleged supervisory status. The Second Circuit in *Yeshiva* itself noted the limited scope of the instant decision. 98 L.R.R.M. at 3252 n.9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 78-67

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

TRUSTEES OF BOSTON UNIVERSITY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

BOSTON UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the First Circuit

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BRIEF FOR THE BOSTON UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN OPPOSITION

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Supreme Court of the United States

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No. 78-67

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QUESTION PRESENTED

Whether the Court of Appeals erred in finding, after a full review of the record, that the National Labor Relations Board reasonably exercised its discretion to determine appropriate collective bargaining units in establishing a unit of full-time faculty at Boston University.

STATEMENT

Petitioner asks this Court to review findings of the National Labor Relations Board that the department chairmen at Boston University are not supervisors within the meaning of section 2(11) of the Act, and that the full-time faculty at the University, exclusive of the faculty of the schools of Law, Medicine and Graduate Dentistry, constitute an appropriate collective bargaining unit.

The foregoing findings are embodied in the Decision and Direction of Election issued by the National Labor Relations Board's Regional Director after a lengthy evidentiary hearing. (Pet. App. C77-C117) Relying, *inter alia*, on evidence that the chairmen's recommendations affecting the status of their faculty colleagues are invariably the product of consultation with at least the senior faculty in the departments, and that, moreover, such actions are frequently reviewed and reversed at higher administrative levels, the Regional Director concluded that the University's department chairmen are not supervisors:

> Based upon the above, particularly the facts that indicate collective rather than authoritarian action, most of which is not only reviewable on the higher administrative levels, but which in significant numbers of cases has been shown to be ineffective, it is found that department chairmen are not supervisors within the meaning of the Act. (Pet. App. C94-C95)

Relying on clearly established Board precedent, the Regional Director also concluded that a unit of full-time faculty exclusive of the faculty of the schools of Law, Medicine and Graduate Dentistry was appropriate.[1] With

[1] The Board has consistently held that a university's law or medical school faculty may be excluded from a faculty bargaining unit. *Fordham University I*, 193 NLRB 134 (1971); *New York University*, 205 NLRB 4 (1973); *Syracuse University*, 204 NLRB 641 (1973); *University of Miami*, 213 NLRB 634 (1974). Where a union seeks to represent a unit including the law school (no union has ever sought inclusion of the medical school faculty), and the law faculty seeks separate representation through its own agent, the law faculty is given the choice of representation in the wider unit, separate representation, or separate non-representation. See *e.g.*, *Syracuse University, supra.* The Board has also found a separate unit of law faculty appropriate in its own right. *Catholic University of America*, 205 NLRB 929 (1973); *University of San Francisco*, 207 NLRB 12 (1973). *Cf. Fairleigh Dickinson University*, 205 NLRB 673 (1973), where the Board permitted inclusion of the dental school faculty where a petitioning union sought their inclusion, and where no separate representation was sought.

regard to the medical and dental schools he noted that they were located in their own complex of buildings, "remote" from the main campus; that there was limited interchange with the main campus faculty; that both schools were operated "at least semi-autonomously with an additional body of trustees" (Pet. App. C114); that "they are separately budgeted, with little real direct financial support from the University" (*Id.*); and that their faculty generally enjoy salaries substantially higher than those of the main campus faculty. He concluded:

> In view of the foregoing factors, the absence of any bargaining history, the limited amount of faculty interchange and the fact that no labor organization seeks to include either the medical or dental faculty in a broader unit, it is found that the faculties of the School of Medicine and the School of Graduate Dentistry do not share a community of interest with the faculty of the schools on the Charles River Campus, that is so interwoven as to render their exclusion from the unit found appropriate herein, inappropriate. (Pet. App. C115).

With regard to the law faculty, the Regional Director, relying on evidence similar to that adduced in connection with the medical and dental faculty, held that:

> [A]s the law school faculty constitutes an identifiable group of employees whose separate community of interest is not irrevocably submerged in the broader community of interest which they share with other faculty members, it is found that either a university-wide unit, as otherwise modified herein, including the faculty of the law school, or a unit limited to the faculty of the law school, would be an appropriate unit for purposes of collective bargaining. Moreover, as no labor organization is seeking to represent its faculty separately, the School of Law is excluded from the unit found to be appropriate herein. (Pet. App. C110)

The Board denied review of the Regional Director's decision, and the AAUP (Boston University Chapter, American Association of University Professors) won the Board-supervised collective bargaining election. Petitioner thereafter refused to bargain on demand. The Board resolved the ensuing unfair labor practice charge on summary judgment and ordered Petitioner to bargain with the AAUP. (Pet. App. B57-B75) Petitioner then sought review in the Court of Appeals.

The Court of Appeals enforced the Board's order. Finding in the record a "firm footing to the Board's findings," it upheld the "Board's determination that the department chairpersons did not exercise supervisory authority over unit personnel and that whatever supervisory authority they did exercise over nonunit, support personnel was insufficient to render them supervisors * * *" (Pet. App. A43)[2] Concluding its own review of the rec-

[2] With respect to the chairmen's supervisory authority over nonunit support personnel, the Court of Appeals found ample support in the record for the Regional Director's finding that such activities consumed no more than five to ten percent of the chairmen's time. The Courts of Appeals have consistently affirmed Board decisions holding such minimal supervisory activity insufficient to support a finding of supervisory status. See *e.g.*, *NLRB* v. *Quincy Steel Casting Company*, 200 F.2d 293, 296 (1st Cir. 1952); *NLRB* v. *Security Guard Service*, 384 F.2d 143, 149, 151 (5th Cir. 1961); *NLRB* v. *Stewart Oil Co.*, 207 F.2d 8 (5th Cir. 1954). The Board continues to adhere to this view: *Automobile Club of Missouri*, 209 NLRB 614 (1974); *Amalgamated Clothing Workers*, 210 NLRB 928 (1974).

ord, the Court of Appeals held that with respect to each of a number of contested issues of fact regarding the nature and efficacy of the chairmen's recommendations "the Board was entitled to find that the chairpersons' recommendations were not 'effective' or that he/she was acting 'in the interest' of the faculty, not the employer." *Id.*[3]

The Court of Appeals also affirmed the Regional Director's findings with regard to the excludability of the law, medical and dental faculty. Noting, *inter alia*, the separate physical locations of the three schools, their separate administrative procedures, their distinct and separate graduation ceremonies, their significant independent financial resources, the substantially higher average salaries enjoyed by their faculty, and the significant differences in the tenure procedures of the three schools when compared with those employed in the rest of the University, the Court of Appeals concluded that, although alternative resolutions of this issue might also be reasonable, it could not say that the Board's decision was either "arbitrary or not based on substantial evidence." (Pet. App. A13)

ARGUMENT

1. Petitioner has advanced no basis for the grant of certiorari in this case. Asserting neither a conflict in the circuits nor that the decisions below are in conflict with applicable decisions of this Court, Petitioner is simply asking this Court to review and set aside the factual findings which underpin the Regional Director's unit de-

[3] Section 2(11) (29 U.S.C. § 152(11)) requires that in order for an individual to be classified a supervisor, he must exercise any of the enumerated indicia of supervisory authority "in the interest of the employer."

termination decision, findings which have been affirmed first by the Board and then, after a full review of the record, by the Court of Appeals.

a. This Court has long held that Congress granted the Board unusually broad discretion, under section 9(b) of the Act, to "decide in each case * * * the unit appropriate for the purpose of collective bargaining * * *." (29 U.S.C. § 159(b)). "[T]he selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed.'" *South Prairie Construction Co.* v. *Operating Engineers*, 421 U.S. 800, 805 (1976), quoting *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947). Only where the "determination of a unit of representation is so unreasonable and arbitrary as to exceed the Board's power," should the courts intervene. *Packard Motor Car Co.* v. *NLRB*, *supra*, at 491-92. See also *May Department Stores Co.* v. *NLRB*, 326 U.S. 376, 380 (1945); *NLRB* v. *Jones & Laughlin*, 331 U.S. 416, 422 (1947).

Petitioner does not credibly assert that the Board's decision in this case is such as to warrant review under the foregoing standard.[4] The Board's treatment of the law, medical and dental faculties is fully consistent with its own precedent (see note 1, *supra*) and with its mandate to fashion an appropriate unit from among reasonable alternatives. *Pittsburgh Plate Glass Co.* v. *Labor Board*, 313 U.S. 146, 152 (1941); *NLRB* v. *Lerner Stores Corp.*, 506 F.2d 706, 707 (9th Cir. 1974); *Local 1325, Retail Clerks International Association* v. *NLRB*, 414 F.2d 1194, 1198-1199 (D.C. Cir. 1969).

[4] Instead, Petitioner suggests, without supporting authority (Pet. pp. 20-22), that the Board is entitled to no deference in this case because it has been inconsistent in its treatment of department chairmen and because its jurisdiction over higher education is just eight years old. This contention is clearly baseless. The Congressional grant of authority to the Board does not vary according to the length of time the Board has regulated an employment relationship. Moreover, as we show briefly below, the claim of inconsistency is insubstantial.

The Board's treatment of the chairmen issue is also well within its discretion and, contrary to Petitioner's assertion (Pet. pp. 20-21), is fully consistent with its own precedent. See, *e.g.*, *Fordham University I*, 193 NLRB 134 (1971); *New York University*, 205 NLRB 4 (1973); *Rosary Hill College*, 202 NLRB 1137 (1973); *Northeastern University*, 218 NLRB 247 (1975). The fact that the Board has sometimes excluded chairmen as supervisors is not, as Petitioner contends, evidence of any inconsistency. Rather it simply reflects differences in the evidence adduced in other cases,[5] and the factual complexities which typically surround the supervisor issue. These complexities are ones which the courts have consistently held are for the Board to resolve. See *e.g.*, *NLRB* v. *Swift & Company*, 292 F.2d 561 (1st Cir. 1961), cited with approval in *Marine Engineers Beneficial Ass'n.* v. *Interlake Steamship Co.*, 370 U.S. 173, 179, n.6 (1962); *Stop & Shop Companies, Inc.* v. *NLRB*, 548 F.2d 17, 18 (1st Cir. 1977); *Global Marine Development of California, Inc.* v. *NLRB*, 528 F.2d 92 (9th Cir. 1975), *cert. denied*, 429 U.S. 821. *Cf.*, *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944); *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 260 (1968).

b. Section 10(e) of the Act provides that the Board's findings of fact are "conclusive if supported by substantial evidence on the record considered as a whole . . ."

[5] See, for example, *Rensselaer Polytechnic Institute*, 218 NLRB 1435 (1975); *Syracuse University*, 204 NLRB 641 (1973); *Adelphi University*, 195 NLRB 639 (1972). Each of the foregoing cases is characterized by a firm Board finding that the chairmen in question possessed effective and independent authority to make major personnel recommendations. For a discussion of the Board's chairmen decisions, see Pollitt and Thompson, *Collective Bargaining on the Campus: A Survey Five Years After Cornell*, Industrial Relations Law Journal, Summer 1976, 231.

(29 U.S.C. 160(e)) As we have shown, the Petitioner's issues relate entirely to factual findings which were fully within the Board's discretion to reach. Petitioner cannot seriously contend that the Court of Appeals "misapprehended or grossly misapplied" the substantial evidence test which governs judicial review of the Board's findings of fact. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). That being the case, there is no occasion for review by this Court:

> Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the hands of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. *Id.*

2. Since the decision of the Court of Appeals in this case, the Second Circuit has refused enforcement of a Board order requiring Yeshiva University to bargain with its faculty. *NLRB* v. *Yeshiva University*, Docket No. 77-4182, 98 LRRM 3245 (2d Cir., decided July 31, 1978) The Second Circuit concluded that the entire faculty at Yeshiva—because of their collective participation in matters of academic governance—were supervisory or managerial employees and as such not entitled to the Act's protections.

Though of undoubted significance to the ongoing application of the Act in higher education, the *Yeshiva* decision affords no basis for Court review of the instant case, since the issue on which it was decided has not been advanced here. The Second Circuit itself acknowledged that "no Court of Appeals has squarely determined the issue" resolved in *Yeshiva*, *viz*: "whether full-time faculty at a mature university are supervisors or managers under

the Act . . ." 98 LRRM 3253, n. 9.[6] The Second Circuit also stressed that it was addressing itself "solely to the situation" at Yeshiva and was not purporting to hold that all faculty at all "mature" universities are supervisory or managerial employees. *Id.*, 98 LRRM at 3252-3.

Petitioner has not contended that all of Boston University's faculty are supervisory or managerial employees. In fact, its expressed disagreements with the decision below are fundamentally inconsistent with any such contention. Petitioner argues that the appropriate faculty bargaining unit should include the faculty of the schools of Law, Medicine and Graduate Dentistry and exclude department chairmen on the ground that they exercise supervisory authority over other faculty. All of these contentions, which were at issue in the representation proceeding below and in the subsequent review by the Board and by the Court of Appeals, necessarily concede faculty to be covered employees within the meaning of the Act. Accordingly, however important the *Yeshiva* decision may be in its own right, it does not convert this case—involving, as we have shown, the application of settled principles of law to ordinary bargaining unit issues—into a case warranting this Court's review.

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[6] *Cf. NLRB* v. *Wentworth Institute*, 515 F.2d 550 (1st Cir. 1975). In *Wentworth Institute*, as the Second Circuit indicated, "the First Circuit simply rejected the Institute's argument that all faculty at all institutions of higher learning must be excluded from the Act's coverage. Limiting itself to the institution at hand, the court found that at Wentworth there was 'no evidence of an instance of significant faculty impact collectively or individually on policy or managerial matters.'" *Id.*, quoting in part from *NLRB* v. *Wentworth Institute*, 515 F.2d at 557.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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September 7, 1978

No. 78-67

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

TRUSTEES OF BOSTON UNIVERSITY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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SUPPLEMENT TO BRIEF FOR THE BOSTON UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN OPPOSITION

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IN THE

Supreme Court of the United States

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SUPPLEMENT TO BRIEF FOR THE BOSTON UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN OPPOSITION

We continue to be of the view that the decision below does not, by itself, present issues appropriate for review by this Court. However, the pending petitions for certiorari in this case and in *NLRB* v. *Yeshiva University*, No. 78-851, have placed respondent's bargaining rights under a continuing cloud of uncertainty. For that reason, we wish hereby to modify partially our position in opposition to the grant of certiorari in this case.

If the petition in *Yeshiva* is denied, or if it is granted and that decision is affirmed, an anomalous situation would result if the petition in this case is denied. Although the bargaining order in this case would impose on Boston University a continuing obligation, enforceable by contempt proceedings in the court of appeals, at Yeshiva and at other similar universities, especially those in the Second Circuit, no such obligation would be enforced. Moreover, in this event, it would remain open to Boston University to argue, in a variety of subsequent Board proceedings, that its faculty are managerial or supervisory employees, thereby very possibly defeating its obligation to bargain.

Furthermore, the decisions of the two courts of appeals are closely related and at least arguably in conflict. In *Yeshiva* the court of appeals decided that faculty members whose collective recommendations on matters of academic governance are normally accepted by the administration are, for that reason, supervisory or managerial employees not subject to the Board's jurisdiction, even though their recommendations are subject to review and final disposition by higher authority. In this case that issue was raised only indirectly. Petitioner argued below and now asks this Court to decide, in the second question presented in its Petition, that the Board should not have included department chairmen in the faculty bargaining unit. The Board included the chairmen on the theory that, in making recommendations on matters of academic governance, they acted primarily in the interest of the faculty. But obviously if the faculty's collective role in governance matters deprives them of employee status, then the chairmen's role in these matters, even if exercised in the interest of the faculty, renders them supervisory or managerial employees.

As stated, the issue decided in *Yeshiva* was not raised directly by Petitioner in the court below. But the Court

of Appeals for the First Circuit, in its acceptance of the Board's finding that chairmen at Boston University are not supervisors, necessarily affirmed the essential criteria on which the Board has relied to determine supervisory or managerial status in its higher education decisions—criteria which were rejected by the Second Circuit in the *Yeshiva* decision.

Accordingly, because the two cases are closely related in terms of the issues they present for this Court's disposition, and because their separate disposition could result in serious disparities in the administration of the National Labor Relations Act, disparities which should surely be avoided, *cf.*, *Commissioner* v. *Sunnen*, 333 U.S. 599 (1948), we suggest that the Court grant review in both cases, limiting the grant in this case to the "subsidiary question fairly comprised" (Rule 23(1)(c)) within the second question stated in the Petition for Certiorari, *viz.*, whether, assuming department chairmen exercise their authority in the interest of the faculty, they are nevertheless supervisory or managerial employees under the National Labor Relations Act. We further suggest that in the event review is granted the two cases be consolidated for argument.

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No. 78-67

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

TRUSTEES OF BOSTON UNIVERSITY,
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SUPPLEMENTAL MEMORANDUM OF BOSTON UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN OPPOSITION

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SUPPLEMENTAL MEMORANDUM OF BOSTON UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN OPPOSITION

We wish herewith to apprise the Court of two points made particularly relevant by last week's decision in *NLRB* v. *Yeshiva University*, No. 78-857 (Feb. 20, 1980). One of them has to do with facts arising since the last briefs were filed in this case—more than one year ago. Both points, we believe, support the denial of review in this case.

1. This Court's decision in *Yeshiva* held that University's faculty to be "managerial employees" by virtue

of their decisive participation in matters of academic governance, *e.g.*, the determination of course offerings; the establishment of teaching methods; and the formulation of grading, admission and graduation policies. *NLRB* v. *Yeshiva University*, No. 78-857, slip op. at 13 (Feb. 20, 1980). In this case no such contentions were made by the Trustees at any time during the lengthy proceedings leading up to Board certification of the AAUP.[1] To the contrary, the Trustees conceded their faculty's status as employees, contending instead that their departmental chairmen should be excluded by virtue of their claimed supervisory status over full-time faculty. It is principally on this ground that they here seek *certiorari*.

Under familiar principles, parties ought not be allowed to advance on appeal arguments they have failed to make below. Section 10(e) of the NLRA expressly so provides: "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. 160(e). There are here no such "extraordinary circumstances." The argument that their faculty are managerial employees was plainly available to the Trustees had they thought it appropriate. It is true that the Board had consistently rejected similar arguments. But the First Circuit, in what was at the time the only judicial review of the Board's position, had distinctly left open the possibility of this Court's *Yeshiva* decision. *NLRB* v. *Wentworth Institute*, 515 F.2d 550 (1st Cir. 1975). And at least one contemporary effort to set the stage for judicial review of the issue on a well-

[1] The Trustees did perfunctorily assert the managerial status of their faculty in their Response to the Board's Notice to Show Cause. See Petitioner's Supplemental Brief, p. 3 n.2. This argument was made on November 29, 1976, more than one year after the election and the AAUP's certification.

developed record failed when the union lost the election. *Northeastern University*, 218 N.L.R.B. 247 (1975).

2. Since the First Circuit ordered the Board's bargaining order enforced in April of 1978, bargaining has in fact occurred between the Trustees of Boston University, Petitioner herein, and the Boston University Chapter, American Association of University Professors (AAUP). After nearly a year of negotiation an agreement was reached in April 1979. The Agreement, which was preceded by a faculty strike, came nearly five years after the faculty had first sought recognition from the Trustees.[2] The Agreement, which is in certain respects retroactive to September 1, 1978, provided fairly substantial economic gains for the faculty and established a grievance procedure under which grievances are currently being processed. It expires on August 31, 1981.[3]

The parties' behavior since April 1978 thus makes the Board's bargaining order substantially moot. That order required the Trustees to bargain with the AAUP. They have bargained with the AAUP, and they have reached a settlement. Under these circumstances, further review of the Board's order is at best unnecessary. At worst it holds out the potential for needless disruption.

We recognize, of course, that the Board's bargaining order imposes a continuing obligation on the Trustees and that, for that reason, it may not technically be moot. But as a practical matter, should the Trustees wish to test *Yeshiva's* applicability to their faculty, they may do so by refusing to bargain with the AAUP at the expiration of the current agreement. If they prevail, that will end the matter. If they do not prevail, the bargaining

[2] The AAUP filed its election petition on October 18, 1974. (Pet. p. 3.)

[3] The Memorandum of Settlement, the Table of Contents, and the duration clause are included as an Appendix to this Memorandum.

order will simply be revived. It cannot seriously be supposed that additional penalties could be imposed on them by virtue of their technical contempt—even assuming they would be found in contempt.[4]

In short, for practical reasons, we suggest that there is every reason not to reopen the question of the Trustees' bargaining obligation at this late date. Allowing the First Circuit's order to stand will not, in any real sense, deprive the Trustees of any rights they might have as a result of the *Yeshiva* decision. They will be free, as we have suggested, to assert any position they choose in the light of that decision, thereby triggering the lengthy fact-finding process necessary to determine the decision's applicability. There is no reason, we submit, to encourage the commencement of that process before anyone desires or requests it.

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[4] We do not believe the force of these considerations to be diminished by the fact that the Memorandum of Settlement provides that the Agreement is "subject to the final disposition of" the First Circuit's order. The fact remains that bargaining occurred and a settlement was reached which is now in effect.

APPENDIX

AGREEMENT BETWEEN THE B.U.C.-A.A.U.P. AND THE TRUSTEES OF BOSTON UNIVERSITY

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MEMORANDUM OF SETTLEMENT

The Boston University Chapter of the American Association of University Professors (Chapter) and the Trustees of Boston University (Trustees) hereby agree as follows:

1. The Trustees and the Chapter accept the terms of the Text of the Agreement attached hereto as an Addendum as modified only in the following respects: [All modifications are incorporated in the Text]

2. No further ratification is required by the Trustees.

3. The current strike of the Chapter shall end upon ratification of this Memorandum of Settlement.

4. Recognizing that the future of Boston University depends in large part upon the mutual good will and trust of all components of the University community, the Trustees and the Chapter agree that there shall be no reprisals or abuse, either institutional or personal, against any member of the University community for his/her actions during the strike.

5. It is understood that the collective bargaining Agreement is subject to the final disposition of First Circuit Cases Numbers 77-1143, 77-1365, and 77-1226, now pending in the Supreme Court of the United States upon a petition of certiorari (No. 87-67). However, it is agreed that, by the execution of this settlement Agreement, neither party waives any of its rights with respect thereto; and it is further agreed that the foregoing does not prejudice the Chapter's right to claim that this agreement remains in effect for its duration.

Signed by the parties on April 13, 1979.

ARTICLE XXV
DURATION OF AGREEMENT

This Agreement shall be in full force and effect for the period from April 13, 1979, to and including August 31, 1981. The Chapter or Trustees may give notice to the other party on or before February 1 prior to the expiration of the Agreement of any intention to terminate or modify the terms of this Agreement upon its expiration. If no agreement is reached by August 31, 1981, this Agreement shall remain in full force and effect for an additional 40 days or until such earlier date as a new agreement is concluded.